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No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. MARTIN BECKER,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether individuals and government contractors seeking public funds and acting with either actual knowledge of the uncertainty of their claims or with deliberate ignorance or reckless disregard of the truth or the falsity of their claims can escape liability under the False Claims Act ("FCA") merely because the government has some knowledge of the uncertainty?

2. Whether the relevance of government knowledge of an allegedly false claim, which was addressed in this case for the first time since the 1986 Amendments to the FCA were enacted, was considered under the appropriate standard in determining that no question of material fact existed as to the liability of respondent who was aware of the uncertainty regarding Congressional authority for the appropriation transfer of $12 Million, and which disregarded whether Congress had approved the appropriation transfer in obtaining and using the funds for purposes not authorized by the Congressional appropriation?

3. Whether a Government Agency, without either Congressional or statutory authority, has the power to direct its government contractor to knowingly use restricted appropriated funds for unrestricted purposes and thus equitably estop the United States from holding the contractor liable for the knowingly unauthorized use of Public Treasury funds in violation of Constitutional and statutory provisions vesting in Congress the exclusive domain and power to appropriate and direct the use of Public Treasury funds?

4. Whether the Court of Appeals has the power to deny a party the right to a jury trial on an issue raised for the first time on appeal where such party had no occasion to controvert or dispute said issue because same was neither raised nor addressed in the District Court?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner Martin Becker, as relator, respectfully submits the following disclosure statement:

Pursuant to Rule 29.6 of the Rules of Supreme Court of the United States, Petitioner Martin Becker, relator, states there is no parent or subsidiary company to be listed, and there is no parent or publicly held corporation, other than the United States of America, having a direct financial interest in the outcome of the litigation.

On information and belief Respondent Westinghouse Savannah River Company the managing and operating contractor for the United States Department of Energy, which owns Savannah River Site, is an affiliate of Westinghouse Government Services Company, L.L.C., a wholly owned subsidiary of Washington Group International, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES

United States of America,
ex rel. Martin Becker, ... Petitioner

v.

Westinghouse Savannah
River Company,. .. . . . . Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United Stated Court of Appeals for the Fourth Circuit, dated and entered September 27, 2002, as amended October 3, 2002 and October 30, 2002.

OPINIONS BELOW

The District Court opinion (App. 40-64) is not reported. The opinion of the Court of Appeals (App. 4-19) is reported in 305 F.3d 284.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 2002. Petition for Rehearing was denied on October 22, 2002. Orders amending Court's opinion were filed on October 3, 2002 and on October 30, 2002. The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

1. Article I, §9, cl 7 U.S. Const.

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. Amendment VII, U.S. Const.

In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statutory Provisions

1. False Claims Act

31 U.S.C. §3729

(a) Liability for certain acts.-Any person who-

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person,...

(b) **Knowing and knowingly defined**.-For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

2. Appropriations Act

31 U.S.C. §1301

(a) appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

31 U.S.C. §1307

Amounts appropriated to construct public buildings remain available until completion of the work. When a building is completed and all liabilities for the construction are paid, balances remaining shall revert immediately to the Treasury.

31 U.S.C. §1532

An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.

3. **Anti-Deficiency Act**

31 U.S.C. §1341 (a)(1)

An officer or employee of the United States Government...may not-

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. §1350

An officer or employee of the United States Government...knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

STATEMENT OF THE CASE

Petitioner, as *qui tam* plaintiff, brought this action against Respondent, Westinghouse Savannah River Company (Westinghouse), Management and Operations (M&O) Contractor for Department of Energy (DOE), for violation of Article I §9, cl 7, U.S. Const., the False Claims Act, the Appropriations Acts and the Anti-Deficiency Act for knowingly falsifying records and using restricted government appropriated funds for unauthorized purposes without the required

Congressional Authorization. Respondent denied the allegations in the complaint and after discovery moved for summary judgment.

Issues Raised in District Court: In moving for Summary Judgment, Respondent raised the question of whether the record evidence presented genuine issues of material fact as to (1) whether Congress approved the transfer of the restricted government funds from one appropriation account, Defense Program (DP), to another appropriation account, Environmental Management (EM), both managed by Respondent, in violation of Constitutional and statutory provisions, and (2) assuming, Congress did not approve the transfer, whether Respondent knowingly used the funds for unauthorized purposes without Congressional approval.

The District Judge found for Respondent on both issues: first, that Congress approved the transfer, and second, that, assuming congressional approval of the transfer was lacking, Respondent did not know of the absence of the congressional approval, (App. 58), and thus the Respondent could not be held liable for using the funds for the unauthorized purpose of offsetting a shortfall of prior year balances in the EM appropriations account managed by Respondent. Accordingly, the District Judge granted Respondent's Motion for Summary Judgment.

Petitioner timely appealed from the grant of Summary Judgment and the rulings of the District Judge.

Issues raised in Court of Appeals: On appeal, Respondent raised for the first time new factual issues and a legal theory inconsistent with the basis on which the District Judge granted summary judgment. These new issues raised for the first time on appeal were neither raised nor addressed in the District Court, and accordingly the Petitioner had no occasion at the District Court level to controvert or introduce contradictory evidence. Respondent, for the first time on appeal, asserted that it could not have been held liable for violation of the Constitutional and statutory provisions in question because such violations would have been committed not only with the knowledge of DOE but also at the express instructions of DOE. On appeal, Respondent thus invoked the doctrine of "Equitable Estoppel" against United States to excuse Respondent from liability for its conduct in violation of Article I §9, cl 7, of the U. S. Constitution and in violation of statutory provisions of the False Claims, Appropriations, and Anti-Deficiency Acts.

The Court of Appeals considered the newly raised issue of estoppel which was neither raised nor addressed in the District Court.

Contrary to the findings on which the District Judge relied in granting summary judgment, the Court of Appeals found that Respondent knowingly used the funds in question without Congressional approval in violation of Article I §9, cl 7, and the statutory provisions of 31 U.S.C. §3729 (a)(4), (a)(7), b, 31 U.S.C. §1301, 1307, 1532, 1341, 1350, and that it was unclear whether Congressional approval for the use of the funds was given.

If the court had stopped there, under applicable and procedural law, the case would have been remanded for trial. The court, however, did not remand for trial, but assumed that if Respondent violated applicable Constitutional and statutory provisions, that DOE not only had knowledge of such violations, but also directed and instructed Respondent to commit the violations. It thereupon ruled that Respondent could not be held liable for fraud under the False Claims Act relying on Equitable Estoppel Doctrine referred to in the Seventh Circuit decision of *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 543 (7th Cir.1999).

Accordingly, the Court of Appeals affirmed the entry of Summary Judgment in favor of Respondent, by Opinion filed September 27, 2002.

The Court of Appeals' opinion is devoid of any reference in the record supporting the assertion that Government personnel instructed Respondent to use the funds without Congressional approval. Nor is there any reference to evidence supporting a conclusion that Respondent followed its instructions.

Petitioner filed a Petition for Rehearing and Petition for Rehearing *en banc*, requesting remand of the case for further inquiry into the factual issue raised for the first time on appeal, and bringing to the attention of the Court of Appeals that its decision in this case is in direct conflict with the decisions of this Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) and *Heckler v. Community Health Services of Crawford City*, 467 U.S. 51 (1984), holding that

equitable estoppel may not be asserted against the Government in regard to a claim for payment of money from the Public Treasury made contrary to statutory appropriations.

The Petition was denied, without comment, on October 22, 2002. On October 30, 2002, however, the Court of Appeals on its own motion further amended the decision of September 27, 2002. The October 30, 2002 amendment deleted from the initial opinion the last sentence on page 6 which stated "subsection (a)(7) requires proof of specific intent to defraud the government or conceal property, not merely proof of knowing creation of a false record or statement."

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORIARI BECAUSE THE FOURTH CIRUCIT HAS INTERPRETED THE FCA IN A MANNER WHICH DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT.

The 1986 amendment to the False Claims Act ("FCA"), 31 U.S.C. §§3729-3733, eliminated language by which a contractor could avoid liability if the government agency with which it contracted knew of the false claim. As Justice Thomas wrote for a unanimous Court in *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939, (1997):

> the 1986 amendment eliminates a defense to a *qui tam* suit--prior disclosure to the Government--and therefore changes the substance of the existing cause of action for *qui tam* defendants by "attaching a new disability, in respect to transactions or considerations already past." (Citation omitted) Id. at 948.

Nevertheless, in the present case the Court of Appeals for the Fourth Circuit held that a government contractor, Westinghouse, could avoid liability under the false claims act if the government agency with which it worked acquiesced in the submission of a $12 million false claim. This holding is squarely at odds with *Hughes* and warrants a grant of certiorari or summary reversal.

B. THIS COURT SHOULD RESOLVE A CIRCUIT CONFLCIT AS TO WHETHER A CONTRACTOR OR INDIVIDUAL AUTOMATICALLY AVOIDS LIABILITY UNDER THE FALSE CLAIMS ACT MERELY BECAUSE THE GOVERNMENT HAS KNOWLEDGE OF THE FALSE CLAIM.

In holding that government knowledge of an allegedly false claim vitiates an FCA action the Fourth Circuit adopts the reasoning of the Seventh Circuit in *U.S. ex. rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999) Unlike the Fourth and Seventh Circuits, the Second, Ninth and Tenth circuits squarely hold that government agency knowledge of the falsity of a contractor's claim does not bar a FCA action.

The Second Circuit in *United States ex. rel. Krindler v. United Technologies*, 985 F.2d 1148 (2d Cir. 1993) addressed the question of whether government knowledge of a false claim vitiates liability under the FCA. There, the false claim action was based on United Technologies allegedly concealing information in connection with the construction of Black Hawk helicopters, which later proved defective. The district court held that because the Black Hawk Project Manager's Office knew of the characteristics which made the claim false, no FCA action was available. The Second Circuit observed:

> The statutory basis for an FCA claim is the *defendant's knowledge* of the falsity of its claim, see § 3729(a) & (b), which is *not automatically exonerated by any overlapping knowledge by government officials*. Id. at 1156. (emphasis added).

The Second Circuit's view is also reflected in the well-reasoned decision of the Ninth Circuit in *United States ex. rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) which interpreted the 1986 amendments to the FCA and held that "the requisite intent [under the FCA] is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense." As the Tenth Circuit explained in *Shaw v. AAA Engineering and Drafting Inc.*, 213 F.3d 519 (10th Cir. 2000):

> Prior to amendments in 1986, the FCA contained the following language: "The court shall have no jurisdiction to proceed with any [FCA] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1976). This language was removed in 1986, however, and government knowledge of a contractor's wrongdoing is no longer an *automatic* defense to a FCA action. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991). Id. at 534. (emphasis added)

The Court of Appeals for the Fifth Circuit in *U.S. v. Southland Management Corp.*, 288 F.3d 665, 686 (5th Cir. 2002), at least in the context of a claim brought by the government, also set forth:

> We find it difficult to justify the proposition that an individual who submits a false claim to the government with knowledge of its falsity should necessarily be excused from liability under the Act merely because the government was also aware that the claim was false when it was submitted.

The Fourth Circuit opinion in the petitioner's case states that it "joins its sister circuits" in holding that the "government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation, " 305 F.3d at 289, (App. 14). But, the Fourth Circuit—by affirming the district court's grant of summary judgment-- overlooks that government knowledge of a false claim does not *automatically* bar an action under the FCA, as it did prior to the 1986 amendments.

Because the Fourth Circuit's opinion as to effect of prior government knowledge on a false claim cannot be reconciled with the decisions of other circuits, this case is appropriate for review by writ of certiorari. Congress has budgeted $359 billion for defense spending this year (K. Guggenheim, "Defense Spending to Rise for Years, Congressional Analyst Say," AP Wire, January 8, 2003), and therefore it is important that government agencies, contractors, and courts have a clear understanding of the prohibitions of the False Claims Act, which should be administered uniformly and efficiently throughout the land.

C. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT ERRONEOUSLY CONCLUDES THAT THE FCA CONTAINS A "STRINGENT SPECIFIC INTENT STANDARD."

The decision of the Court of Appeals in this case is in conflict with the plain language of the FCA on the issue of specific intent as well. The decision in this case

is premised on the erroneous conclusion that the FCA contains a "stringent specific intent standard."

While the Court of Appeals' final opinion deleted the part of its reference to a requirement for specific intent to defraud, this deletion occurred only after the Petition for Rehearing and Rehearing *en banc* was denied in this case. Even with the deleted language, the decision in this case is still impacted by the initial opinion's erroneous view that specific intent is required for a FCA violation. This is so because knowledge and intent are overlapping concepts and, thus, it can hardly be said that the erroneous view of specific intent had no impact on the analysis of the scienter or knowledge involved. It is apparent that, despite the deleted words, the final opinion continued to adhere to the erroneous stringent specific intent standard as is evidenced by the retention of the following in the final opinion:

> Becker failed to raise a triable issue that Westinghouse knowingly made a false record or statement pursuant to §3729(a)(7) and necessarily failed to raise a triable issue on *the more stringent specific intent standard of §3729(a)(4).* The district court properly granted Westinghouse's motion for summary judgment. *Becker, supra.* at 289, (emphasis added) (App. 15, 30).

Moreover, it was in the same paragraph discussing §3729(a)(4) and (a)(7) that the Court of Appeals decision considered when a person acts knowingly so

as to impose civil liability under the FCA. *Becker, supra.*, at 288. It is apparent that only on the basis that the court considered specific intent as required to impose liability that the court also concluded that if the government has knowledge, specific intent or knowledge of the wrongdoer was excused. However, since, as the 1986 Amendments make clear, no specific intent is required to be shown and deliberate ignorance or reckless disregard as to the truth or falsity of the information imposes liability, §3729(b), the focus must be on the wrongdoer, not the government. Because the court focused on an erroneous specific intent requirement, it is apparent that the Court of Appeals overlooked the 1986 Amendments and the impact these amendments present in the analysis regarding whether a wrongdoer is excused merely because the government has some knowledge of the wrongdoing.

D. QUESTIONS OF MATERIAL FACT EXIST AS TO WHETHER RESPONDENT WESTINGHOUSE IS LIABLE UNDER THE FALSE CLAIMS ACT IN THIS CASE.

The 1986 amendments to the False Claims Act have been characterized as broad and remedial and civil as opposed to criminal in nature. These amendments "are a vast, obvious, expansion of the substantive standard for FCA liability over the pre-1986 law." The 1986 amendments broaden liability under the Act by providing for violations for deliberate ignorance or reckless disregard, without proof of specific intent. *U.S. v. TDC Management Corp., Inc.*, 24 F. 3d 292, 297 (D.C. Cir. 1994); *U.S. v. Hercules*, 929 F.Supp. 1418, 1431 (D.Utah 1996). Extreme carelessness

in failing to determine information is "knowing" even under the Act prior to the 1986 Amendments. *U.S. v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973). The decision of the Court of Appeals here contravenes the broad, remedial purposes of the Act and 1986 Amendments. It does so by allowing Westinghouse to engage in deliberate ignorance by disregarding their own uncertainty as to whether they were entitled to receive a $12 Million payment. Notwithstanding the uncertainty of the government, Westinghouse was aware of the uncertainty and, nevertheless, without making even limited inquiry so as to be reasonably certain that they were entitled to the public funds they sought, used these funds for unrelated purposes. In light of the record here and the broad and remedial purposes of the Act and Amendments, there is at least a question of fact as to Westinghouse's liability in these circumstances.

The opinion of the Court of Appeals recognized that Respondent "may receive payment charged to an appropriations account *only* for authorized work," and that "appropriations to Defense Programs accounts could not be transferred to Environmental Management accounts without Congressional approval." *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 286 (4th Cir. 2002), (App. 6-7) (emphasis added). The Court of Appeals opinion further determined that the "evidence before the district court did not show whether Congressional approval for the transfer was given" in the present case. Id. at 286, (App 8 Fn. 3). Nevertheless, despite this uncertainty, Respondent used $12 Million "for Plant expenditures unrelated to Building construction"

Id. at 287, (App 9), for which the funds had been appropriated by Congress. The Court of Appeals opinion also determined that Respondent, "Westinghouse was aware of the uncertainty ... regarding Congressional authority for the appropriation transfer" of the $12 Million, Id. at 287, (App. 9), and, finally, it "is possible to infer from the evidence that ... Westinghouse *at least negligently disregarded* whether Congress had approved the appropriation transfer." Id. at 288, (App. 12) (emphasis added).

The foregoing determinations of the Court of Appeals opinion present sufficient evidence to show or infer that Westinghouse had actual knowledge of the fact Congressional approval was questionable. It shows that Westinghouse disregarded this knowledge in order to use the funds. At the least, these determinations are evidence that Westinghouse acted in deliberate ignorance and/or in reckless disregard of the truth or falsity of the information.

In finding that "Westinghouse properly relied on DOE's knowledge of Congressional authority for the appropriation transfer," and that DOE's "full knowledge" of the facts negates that of Westinghouse, Id. at 289, (App. 15), the Court of Appeals ignores its own determination that the "evidence before the district court did not show whether Congressional approval for the transfer was given." Thus, there is at least an inference that DOE had no knowledge, or at best uncertain knowledge, not "full" knowledge of Congressional authority for the transfer to impart to Westinghouse, necessarily leading to an inference that

DOE did not inform Westinghouse that the transfer was approved and Westinghouse could not have relied on DOE's, unclear at best, knowledge. Additionally, although the Court of Appeals' opinion indicates the government personnel instructed Respondent to use the funds without Congressional approval, the Court of Appeals' opinion is devoid of any reference in the records supporting this assertion. Nor is there any evidence to support such a conclusion or that Respondent followed such instructions. Rather, as set forth by the Court of Appeals' opinion, there is evidence that Westinghouse was actually aware of the uncertainty and disregarded whether the Congressional approval had been obtained.

Under the False Claims Act, 31 U.S.C. §3729(b), Defendants are subject to liability if they have actual knowledge of the falsity of the claim or act with deliberate ignorance or reckless disregard of the truth or falsity of the claim. Here, the "at least" negligent disregard conclusion of the Court of Appeals does not rule out reckless disregard. In fact, by saying "at least" negligent disregard, there is an inference that the disregard was reckless or greater.

The Court of Appeals opinion reaches its conclusion by reasoning that the government's knowledge can negate the scienter required for a False Claim Act violation. Id. at 289 (App. 15). However, under the definition in §3729(b) of "knowing and knowingly," "no proof of specific intent to defraud is required." Additionally, in this case, Westinghouse cannot rely on the government's uncertain knowledge. There is evidence that Westinghouse was *actually aware*

of the uncertainty and disregarded whether required Congressional approval for the transfer of the $12 Million had been obtained, when using the funds for unrelated purposes, not authorized by the Congressional appropriation.

The scienter (knowledge) of Westinghouse is not automatically negated in this case, even assuming that the government's knowledge of the facts underlying an allegedly false record or statement *can* negate the scienter required for a False Claims Act violation. There is no contention here that Westinghouse was not aware of the duty imposed upon them under the False Claims Act. See e.g. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) (clearly showing Westinghouse's knowledge of the False Claims Act). Accordingly, Westinghouse had actual knowledge of the pertinent legal duty. Furthermore, a jury is free to credit the fact that Westinghouse was aware of the uncertainty of whether the $12 Million payment to them was authorized. A jury is free to credit the fact that Westinghouse disregarded this uncertainty. A jury is free to weigh circumstantial evidence, including the motive of Westinghouse to receive and keep the funds. A jury is free to determine that because DOE did not know whether or not Congressional approval was given to allow the use of the funds, DOE did not tell Westinghouse the transfer was approved. As set forth by this court, "knowledge and belief are characteristically questions for the factfinder, in this case the jury." *Cheek v. U.S.*, 498 U.S. 192 (1991). "It goes without saying that matters of intent are for the jury to consider." *McCormick v. U.S.*, 500 U.S. 257 (1991). Further, intent of wrongdoing is usually

secretive and, by necessity, must be shown by circumstantial evidence. *U.S. v. Kwong*, 14 F.3d. 189, 194 (2nd Cir. 1994). The record in this case, even as found by the Court of Appeals, presents genuine issues of material fact as to Westinghouse's liability for using the funds for purposes unrelated to the project for which the funds were appropriated.

The question of scienter under the FCA is an important question, requiring consideration of factors under some guidelines which are not set forth in the opinion below, but should be settled by this Court. This case presents an opportunity for this Court to set forth such guidelines in determining whether summary judgment is appropriate, specifically in a case where the government's knowledge of the wrongdoing is unclear but the wrongdoer is aware of the uncertainty of their claim and nevertheless ignores and disregards this uncertainty in submitting the false claim.

E. THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT REGARDING EQUITABLE ESTOPPEL.

The decision of the Court of Appeals that the United States is equitably estopped from holding Respondent liable for violations of Article I, §9, cl 7, U.S. Const., the Appropriations Act and Anti-Deficiency Act is contrary to and in conflict with the rationale of the decisions of this Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990);

Heckler v. Community Health Services, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *INS v. Hibie*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961); see also *Sutton v. United States*, 256 U.S. 575 (1921) (holding Secretary of War had no power to direct payment of more from treasury than amount appropriated and contractor had notice of such limitation of authority). Similarly here, without Congressional approval and contrary to statutory requirements, the Department of Energy had no power to direct and instruct Respondent to use the Treasury funds at issue for purposes other than for which they were initially appropriated and restricted, that being the building construction. Furthermore, Respondent, as a M&O contractor had notice of such limitation of authority.

That the decision of the Court is erroneous is clearly manifested by the rationale of this Court in *Richmond*, from which we quote:

> Our cases underscore the straightforward and explicit command of the Appropriation Clause, 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.' 496 U.S. 414, 424-426
>
> ....

> Indeed, it would be most anomalous for a judicial order to require a Government officer... to make an extrastatutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress, See 31 U.S.C. §1341, 1350. If an executive officer on his own initiative had decided that, in fairness, respondent should now receive benefits despite the statutory bar, the official would risk prosecution. That respondent now seeks a court order to effect the same result serves to highlight the weakness and novelty of his claim.
>
> ....
>
> The whole history and practice with respect to claims against the United States reveals the impossibility of estoppel claims for money in violation of statute. 496 U.S. 414, 430-431

Accepting the Court of Appeals' factual predicate, the action here in transferring clearly restricted funds from one appropriation account to another for use for unauthorized purposes, taken together with Respondents' knowingly false classification, false records and use of such funds for unauthorized purposes in violation of both Constitutional and statutory requirements, and the

ruling of the Fourth Circuit that Respondent cannot be held liable for such violations constituted an undue intrusion upon the exclusive domain and power of the Congress vested in it by Article I, §9, cl 7, "over the public purse of the Nation...and direct its expenditures".

The decision of the Court of Appeals affords this Court the opportunity to settle the inconsistent treatment among the Circuits, 2d, 9th, 7th, 3rd, 5th, and D.C., on the equitable estoppel issue. See, e.g., *Schweiker*, 450 U.S. at 792 (Marshall, J., dissenting).

The Court of Appeals has decided an important federal question that has not been, but should be settled by this Court as it relates to whether the United States can be equitably estopped from enforcing against Respondent and other government contractors the Appropriation Clause of the U.S. Constitution and the statutory provisions of the False Claims Act, Appropriations Act and Anti-Deficiency Act, an issue of national concern relating to "a claim for payment of money from the Treasury contrary to statutory appropriation" left open by the Court in *Richmond*, 496 U.S. at 424-426 and the concurring opinion of Chief Justice Rehnquist in *Heckler*, 467 U.S. at 66-68.

Even if this Court should hold that the estoppel doctrine is applicable it cannot be invoked here because the purported conduct of the government agency did not result in a change of Respondent's condition for the worse. See *Heckler*, (holding the

equitable estoppel does not apply to a party claiming estoppel unless its position was changed for the worse.).

F. PETITIONER WAS DENIED THE RIGHT TO JURY TRIAL ON THE FACTUAL ISSUE RAISED FOR THE FIRST TIME ON APPEAL.

The decision of the Court of Appeals is in direct conflict with the holdings of this Court that it is beyond the legitimate function of an appellate court, in affirming summary judgment against a party, to deprive the party of the right to controvert material facts or legal theories, and have a trial on the merits as to issues raised for the first time on appeal where such party had no occasion to dispute or controvert such material facts and legal theories because such issues were neither raised nor addressed in the District Court. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) (citing *Fountain v. Filson*, 336 U.S. 681 (1949); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947). See also recent decision of *INS v. Ventura*, 537 U.S. ___, 123 S.Ct. 353 (2002).

In each of the cited cases, the question before this Court was whether an appellate court could order judgment for a successful party on an issue as to which the opposing party had no opportunity to controvert material facts that were decisive in the appellate court below.

The rationale of the foregoing cases applies with equal force to the facts in this case.

The effect of Court of Appeals' holding deprives the United States and Petitioner of the right to submit to a jury under the Seventh Amendment relevant evidence refuting Respondent's new facts. "The Amendment is impartial to the guaranty of both." *Galloway v. U.S.*, 319 U.S. 372, 393 (1943).

CONCLUSION

The Court should grant the petition in that the decision of the Court of Appeals directly conflicts with decisions of this Court. Furthermore, the Court should grant the petition to resolve circuit conflicts regarding whether and under what circumstances government knowledge of a false claim will bar a FCA action. Additionally, this Court should grant the petition to clarify the scienter requirement of the FCA, and whether summary judgment may be granted when there are unresolved questions regarding a contractor's specific intent. Alternatively, the Court should summarily reverse in light of *Hughes Aircraft*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 01-2452
(CA-98-190)

United States of America
ex rel. Martin Becker,
Plaintiff - Appellant,

versus

Westinghouse Savannah River Company,
Defendant - Appellee.

Filed: October 30, 2002
Entered: October 30, 2002

ORDER

The court further amends its opinion filed September 27 and amended October 3, 2002, as follows:

On page 6, first full paragraph -- the last sentence in the paragraph is deleted, and is replaced with the following:

> Subsection (a)(7) imposes civil liabilities on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

For the Court - By Direction
/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 01-2452
(CA-98-190)

United States of America
ex rel. Martin Becker,
Plaintiff - Appellant,

versus

Westinghouse Savannah River Company,
Defendant - Appellee.

Filed: October 3, 2002
Entered: October 3, 2002

ORDER

The court amends its opinion filed September 27, 2002, as follows:

On page 5, first full paragraph, line 11 -- the date is corrected to read "July 11, 2001."

For the Court - By Direction
/s/ Patricia S. Connor
Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. Martin Becker,
Plaintiff-Appellant,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Aiken.
Cameron McGowan Currie, District Judge.
No. 01-2452
(CA-98-190)

Argued: June 3, 2002
Decided: September 27, 2002
Entered: September 27, 2002

Before MOTZ and KING, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by published opinion. Senior Judge Beezer wrote the opinion, in which Judge Motz and Judge King joined.

COUNSEL

ARGUED: John Steven Simmons, SIMMONS & GRIFFIN, L.L.C., Columbia, South Carolina; Stuart F. Pierson, TROUTMAN SANDERS, L.L.P., Washington, D.C., for Appellant. Jeffrey Stuart Patterson, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellee.

ON BRIEF: Henry Hammer, HAMMER, HAMMER, CARRIGG & POTTERFIELD, Columbia, South Carolina, for Appellant. Daniel J. Westbrook, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellee.

OPINION

BEEZER, Senior Circuit Judge:

Martin Becker brought this suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Becker alleges that Westinghouse Savannah River Company ("Westinghouse") spent government funds for an unauthorized purpose and created false records to conceal the disbursement. Becker appeals the district court's entry of summary judgment and assigns error to the court's rulings on several procedural motions. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

The Savannah River Plant ("Plant") is a federally-owned nuclear installation in South Carolina owned by the United States. The Department of Energy ("DOE") contracts with Westinghouse for operation and maintenance of the Plant on a cost plus basis. Westinghouse requests funding for Plant projects from DOE. If DOE approves Westinghouse's funding requests, it submits the requests to the President for inclusion in the budget, who then submits the budget to Congress for authorization. *See* 1 Office of the Gen. Counsel, U.S. Gen. Accounting Office, Principles of Federal Appropriations Law 1-13 to 1-18 (2d ed. 1991). If Congress appropriates funds for the specific funding request, DOE "obligates" funds for the specified project and establishes an appropriations account.[1] Westinghouse may receive payment charged to an appropriations account only for authorized work and only in amounts equal to Westinghouse's actual costs plus an additional fee. *See id.* at 2-4.

---

[1] No actual money is placed in DOE's appropriations accounts. Appropriations "represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations, specified in the appropriations acts." 1 Principles of Federal Appropriations Law, *supra*, at 2-4.

In Fiscal Years 1992 through 1995, Congress appropriated $55 million for the construction of three buildings at the Plant ("Building Construction").[2] DOE obligated just under $54 million and established appropriations accounts specifically for Building Construction managed by DOE's Office of Defense Programs. Westinghouse completed the Building Construction under budget, with a balance of at least $12 million of appropriated funds in the Defense Programs accounts.

In January 1995, DOE underwent management and budget reorganization. Management responsibility for the Westinghouse Defense Programs accounts was transferred to DOE's Office of Environmental Management. Because the Offices of Defense Programs and Environmental Management were funded through separate Congressional appropriations, however, appropriations to Defense Programs accounts could not be transferred to Environmental Management accounts without Congressional approval. *See* 1 Principles of Federal Appropriations Law, *supra*, at 2-25 to 2-28. Although DOE apparently requested Congress to authorize

---

[2] The appropriations are designated as line items 92-D-150 and 92-D-153 and can be found in the following public laws: National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 3102(2), 105 Stat. 1290, 1564-65 (1991); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 3104(b)(1), 106 Stat. 2315, 2633-34 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 3103(b)(1), 107 Stat. 1547, 1940-41 (1993); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 3103(a)(5), 108 Stat. 2663, 3080-81 (1994).

transfer of the Defense Programs appropriations to Environmental Management accounts, DOE was unclear whether approval by Congress was actually given.[3]

Despite this uncertainty, DOE transferred approximately $12 million from the Defense Programs accounts to Environmental Management accounts. DOE directed Westinghouse to change Budgeting and Reporting codes in DOE and Westinghouse's shared accounting system. The new codes would indicate that the $12 million of appropriations constituted a credit balance in the Environmental Management account.

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[3] The evidence before the district court did not show whether Congressional approval for the transfer was given. In a 1995 Conference report, Congress authorized $667 million of "prior year balances" to be used for Defense Environmental Restoration and Waste Management accounts, which are under the supervision of the Office of Environmental Management. H.R. Conf. Rep. 104-293, at *68. It is unclear from the face of the report whether Congress meant to authorize a lump-sum transfer from all Defense Programs accounts for which management responsibility was transferred to the Office of Environmental Management or to grant only "deobligation-reobligation" authority to DOE to use funds from expired Fiscal Year 1995 Environmental Management accounts. *See* 1 Principles of Federal Appropriations Law, *supra*, at 7-53. A lump-sum appropriation allows the recipient agency to distribute funds among the individual line item accounts as it sees fit. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984); 1 Principles of Federal Appropriations Law, *supra*, at 6-158 to 6-167. Even if Congress authorized a lump-sum transfer, there is insufficient record evidence to determine as a matter of law whether DOE treated the line item transfer at issue here as part of that approved lump-sum transfer and thus transferred the funds pursuant to Congressional authority.

Although Westinghouse was aware of the uncertainty within DOE regarding Congressional authority for the appropriations transfer, it acceded to the Department's direction and changed the codes. DOE then relied upon the putative Environmental Management funding authority indicated by the codes to authorize payment to Westinghouse for Plant expenditures unrelated to Building Construction.

Becker filed this suit, averring that Westinghouse had wrongfully retained and used government funds and had created false records to conceal this conduct in violation of §§ 3729(a)(4) and (a)(7) of the FCA.[4] The government investigated the allegations in Becker's complaint but declined to intervene, giving Becker the right to conduct the action *qui tam*. 31 U.S.C. §§ 3730, 3730b.

During the protracted course of discovery, Becker learned that documents divulged by DOE pursuant to Becker's Freedom of Information Act requests had been provided to DOE by Westinghouse. In a letter to the district court outlining the progress of discovery, Becker argued that the fact that Westinghouse originally possessed the documents was relevant to whether Becker's suit was prohibited under the FCA's public disclosure bar. *See* 31 U.S.C. § 3730(d)(4)(A). Becker requested that the district court order Westinghouse to produce a witness to testify

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[4] Becker also alleged that Westinghouse misrepresented the costs of the Building Construction to the government in violation of §§ 3729(a)(1), (a)(2) and (a)(7), but withdrew those claims and does not appeal the district court's dismissal of them.

about the exchange of documents between Westinghouse and DOE and the origin of those documents. In an order filed July 11, 2001, the district court denied the request without comment.

On August 7, one week before the close of the scheduled discovery period, Westinghouse moved for summary judgment. The following day, Westinghouse served Becker with the affidavit of John Pescosolido, Chief Financial Officer for DOE's Savannah River Operations. On September 4, more than three months after Westinghouse served Becker with documents and objections responsive to Becker's discovery requests, Becker moved to compel the production of two types of accounting documents mentioned by Pescosolido in his affidavit.

The district court granted Westinghouse's motion for summary judgment and denied as untimely Becker's motion to compel discovery. Becker moved for reconsideration, which the district court denied.

Becker timely appeals the summary judgment in favor of Westinghouse, the denial of Becker's motion to compel discovery, the denial of Becker's request that the court order Westinghouse to produce a witness, and the denial of Becker's motion for reconsideration. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

II

We review de novo the district court's summary judgment in favor of Westinghouse. *See Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). Summary judgment may be granted only when the record evidence, construed in the light most favorable to the nonmovant, shows that "there is no genuine issue as to any material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). A "genuine issue" exists if a reasonable jury could return a verdict for the non-movant. *Owen v. Carpenter's Dist. Council*, 161 F.3d 767, 770 (4th Cir. 1998). We may affirm summary judgment on any ground supported by the record. *Brown v. Trans World Airlines*, 127 F.3d 337, 343 (4th Cir. 1997).

Section 3729(a)(7) of the FCA imposes civil liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." A person acts "knowingly" if he or she knows the record or statement is false or acts in deliberate ignorance of, or with reckless disregard for, the truth or falsity of the record or statement. 31 U.S.C. § 3729(b). Subsection (a)(4) imposes civil liability on any person who "has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt." Subsection (a)(7) imposes civil liabilities on any person who "knowingly makes, uses, or causes to be made or used, a false

record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

Becker argues that Westinghouse violated § 3729(a)(4) and (a)(7) by acquiescing to DOE's instructions to change the Budgeting and Reporting codes. He contends that Westinghouse changed the Budgeting and Reporting codes while in deliberate ignorance of the existence or lack of Congressional authority for the appropriations transfer or with reckless disregard for whether such authority existed. Becker argues that changing the codes concealed from the government the fact that the appropriations were originally designated for Defense Programs accounts, and that the change enabled Westinghouse to request and receive disbursement from those appropriations for a purpose other than that for which the appropriations were originally authorized.

We find Becker's argument problematic. It is possible to infer from the evidence that, when changing the Budgeting and Reporting codes, Westinghouse at least negligently disregarded whether Congress had approved the appropriations transfer. Yet DOE had at least as much knowledge as Westinghouse regarding Congressional authority for the transfer and nonetheless instructed Westinghouse to change the codes.

Durcholz, decided by the Seventh Circuit, is factually similar to this case. There, a government military facility needed a sedimentation pond to be quickly dredged. *United States ex rel. Durcholz v. FKW,*

Inc., 189 F.3d 542, 543 (7th Cir. 1999). To speed the process, a facility official instructed the contractor to submit invoices for unperformed excavation work instead of invoices for dredging. *Id.* at 544. The contractor complied, dredged the pond, and was paid by the facility. *Id.* Durcholz brought suit as relator for the United States, alleging that the contractor knowingly submitted false claims to the government. The Seventh Circuit upheld the district court's summary judgment for the contractor, reasoning that

> [i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA. . . . *We decline to hold [defendant] liable for defrauding the government by following the government's explicit directions.*

Id. at 545 (emphasis added).

Besides the Seventh, at least three other circuits recognize that prior government knowledge of an allegedly false claim can negate the scienter required for an FCA violation. *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000);

see also United States v. Southland Mgmt. Corp., 288 F.3d 665, 686 (5th Cir. 2002) (rejecting government knowledge defense but noting that such a defense would be viable "where the falsity of the claim is unclear and the evidence suggests that the defendant actually believed his claim was *not false* because the government approved and paid the claim with full knowledge of the relevant facts"). The relevance of the government's knowledge of an allegedly false claim has not been addressed in this Circuit since the 1986 amendments to the FCA.[5] Today, we join with our sister circuits and hold that the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.

Becker essentially contends that in changing the Budgeting and Reporting codes, Westinghouse implicitly represented to the government that the appropriations were authorized for Environmental Management purposes. In following DOE's instructions, however, Westinghouse properly relied on DOE's knowledge of Congressional authority for the appropriations transfer gleaned from DOE's communications with Congress. *Cf. United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1238 (11th Cir. 1999) (noting that contractor in unauthorized possession of government property must return it or "otherwise dispos[e] of it in accordance with the government's

---

[5] Before the 1986 amendments to the FCA, full government knowledge of the facts underlying a *qui tam* action precluded the district court's jurisdiction to hear the suit. 31 U.S.C. § 3730(b)(4) (1982).

instructions"). DOE's full knowledge of the material facts underlying any representations implicit in Westinghouse's conduct negates any knowledge that Westinghouse had regarding the truth or falsity of those representations.

Becker failed to raise a triable issue that Westinghouse knowingly made a false record or statement pursuant to § 3729(a)(7) and necessarily failed to raise a triable issue on the more stringent specific intent standard of § 3729(a)(4). The district court properly granted Westinghouse's motion for summary judgment.

III

A.

Becker challenges two discovery rulings made by the district court: the September 28 order denying Becker's motion to compel production of documents mentioned in Pescosolido's affidavit, and the July 11 order denying Becker's request that Westinghouse provide a witness to testify about document exchanges between Westinghouse and DOE during discovery. Becker contends that the evidence he sought would have been relevant to Westinghouse's knowledge of Congressional authority for the funds transfer. We afford substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of that discretion. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

The district court denied as untimely Becker's September 28 motion to compel discovery. Local Rule 37.01 of the District Court for the District of South Carolina states that "[m]otions must be filed within twenty (20) days after receipt of the discovery response to which the motion to compel is directed." The district court has discretion to consider an untimely motion to compel if the movant "offer[s] an acceptable explanation for [the motion's] tardiness." *See Spencer Med. Assocs. v. Comm'r*, 155 F.3d 268, 273 (4th Cir. 1998). Becker concedes that his motion was untimely, but argues that his tardiness was justifiable due to "the scope of discovery" and the fact that Westinghouse "stated that it had produced all of the potentially responsive documents" in its responses to Becker's discovery requests.

The district court denied without comment Becker's request that the court order Westinghouse to produce a witness to testify about Freedom of Information Act exchanges between DOE and Westinghouse during the course of litigation. Becker contends that this denial precluded him from obtaining evidence relevant to Westinghouse's knowledge of Congressional authority for the funds transfer.

We need not determine whether the district court abused its discretion. As we have explained, DOE's full knowledge of the facts surrounding Westinghouse's alleged false statement negates the scienter required for violation of the FCA. DOE was the entity involved in appropriations discussions with Congress; Westinghouse could not have had any more knowledge about those discussions and their outcome

than DOE itself. Any evidence tending to show Westinghouse's knowledge of the truth or falsity of the claim is immaterial. Even if the district court erred in rejecting Becker's reasons why his motion to compel was tardy or why Westinghouse should be compelled to produce a witness, the error was harmless. *See* Fed. R. Civ. P. 61.

B.

Becker challenges the district court's denial of his motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). We review for abuse of discretion a district court's denial of a Rule 59(e) motion. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 402 (4th Cir. 1998).

There are three circumstances in which the district court can grant a Rule 59(e) motion: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Becker's motion did not point to newly discovered evidence or an intervening change in law that would justify altering or amending the judgment. The district court's summary judgment was legally correct and did not work a manifest injustice. "[M]ere disagreement does not support a Rule 59(e) motion." *Hutchinson v. Staton*, 994 F.2d 1076, 1082-83 (4th Cir. 1993). The district court properly denied the motion.

C.

The district did not err by denying Becker's motion for reconsideration. Any error committed by the district court in managing discovery was harmless.

IV

The district court properly entered summary judgment and denied Becker's motion to alter or amend the judgment. If the district court erred in denying Becker's motion to compel discovery or his request that the Court order production of a witness, that error was harmless.

AFFIRMED

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. Martin Becker,
Plaintiff-Appellant,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Aiken.
Cameron McGowan Currie, District Judge.
No. 01-2452
(CA-98-190)

Argued: June 3, 2002
Decided: September 27, 2002
Entered: September 27, 2002

Before MOTZ and KING, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by published opinion. Senior Judge Beezer wrote the opinion, in which Judge Motz and Judge King joined.

COUNSEL

ARGUED: John Steven Simmons, SIMMONS & GRIFFIN, L.L.C., Columbia, South Carolina; Stuart F. Pierson, TROUTMAN SANDERS, L.L.P., Washington, D.C., for Appellant. Jeffrey Stuart Patterson, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellee.

ON BRIEF: Henry Hammer, HAMMER, HAMMER, CARRIGG & POTTERFIELD, Columbia, South Carolina, for Appellant. Daniel J. Westbrook, NELSON, MULLINS, RILEY & SCARBOROUGH, L.L.P., Columbia, South Carolina, for Appellee.

OPINION

BEEZER, Senior Circuit Judge:

Martin Becker brought this suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Becker alleges that Westinghouse Savannah River Company ("Westinghouse") spent government funds for an unauthorized purpose and created false records to conceal the disbursement. Becker appeals the district court's entry of summary judgment and assigns error to the court's rulings on several procedural motions. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

The Savannah River Plant ("Plant") is a federally-owned nuclear installation in South Carolina owned by the United States. The Department of Energy ("DOE") contracts with Westinghouse for operation and maintenance of the Plant on a cost plus basis. Westinghouse requests funding for Plant projects from DOE. If DOE approves Westinghouse's funding requests, it submits the requests to the President for inclusion in the budget, who then submits the budget to Congress for authorization. *See* 1 Office of the Gen. Counsel, U.S. Gen. Accounting Office, Principles of Federal Appropriations Law 1-13 to 1-18 (2d ed. 1991). If Congress appropriates funds for the specific funding request, DOE "obligates" funds for the specified project and establishes an appropriations account.[6] Westinghouse may receive payment charged to an appropriations account only for authorized work and only in amounts equal to Westinghouse's actual costs plus an additional fee. *See id.* at 2-4.

---

[6] No actual money is placed in DOE's appropriations accounts. Appropriations "represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations, specified in the appropriations acts." 1 Principles of Federal Appropriations Law, *supra*, at 2-4.

In Fiscal Years 1992 through 1995, Congress appropriated $55 million for the construction of three buildings at the Plant ("Building Construction").[7] DOE obligated just under $54 million and established appropriations accounts specifically for Building Construction managed by DOE's Office of Defense Programs. Westinghouse completed the Building Construction under budget, with a balance of at least $12 million of appropriated funds in the Defense Programs accounts.

In January 1995, DOE underwent management and budget reorganization. Management responsibility for the Westinghouse Defense Programs accounts was transferred to DOE's Office of Environmental Management. Because the Offices of Defense Programs and Environmental Management were funded through separate Congressional appropriations, however, appropriations to Defense Programs accounts could not be transferred to Environmental Management accounts without Congressional approval. *See* 1 Principles of Federal Appropriations Law, *supra*, at 2-25 to 2-28. Although DOE apparently requested Congress to authorize

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[7] The appropriations are designated as line items 92-D-150 and 92-D-153 and can be found in the following public laws: National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 3102(2), 105 Stat. 1290, 1564-65 (1991); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 3104(b)(1), 106 Stat. 2315, 2633-34 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 3103(b)(1), 107 Stat. 1547, 1940-41 (1993); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 3103(a)(5), 108 Stat. 2663, 3080-81 (1994).

transfer of the Defense Programs appropriations to Environmental Management accounts, DOE was unclear whether approval by Congress was actually given.[8]

Despite this uncertainty, DOE transferred approximately $12 million from the Defense Programs accounts to Environmental Management accounts. DOE directed Westinghouse to change Budgeting and Reporting codes in DOE and Westinghouse's shared accounting system. The new codes would indicate that the $12 million of appropriations constituted a credit balance in the Environmental Management account.

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[8] The evidence before the district court did not show whether Congressional approval for the transfer was given. In a 1995 Conference report, Congress authorized $667 million of "prior year balances" to be used for Defense Environmental Restoration and Waste Management accounts, which are under the supervision of the Office of Environmental Management. H.R. Conf. Rep. 104-293, at *68. It is unclear from the face of the report whether Congress meant to authorize a lump-sum transfer from all Defense Programs accounts for which management responsibility was transferred to the Office of Environmental Management or to grant only "deobligation-reobligation" authority to DOE to use funds from expired Fiscal Year 1995 Environmental Management accounts. *See* 1 Principles of Federal Appropriations Law, *supra*, at 7-53. A lump-sum appropriation allows the recipient agency to distribute funds among the individual line item accounts as it sees fit. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984); 1 Principles of Federal Appropriations Law, *supra*, at 6-158 to 6-167. Even if Congress authorized a lump-sum transfer, there is insufficient record evidence to determine as a matter of law whether DOE treated the line item transfer at issue here as part of that approved lump-sum transfer and thus transferred the funds pursuant to Congressional authority.

Although Westinghouse was aware of the uncertainty within DOE regarding Congressional authority for the appropriations transfer, it acceded to the Department's direction and changed the codes. DOE then relied upon the putative Environmental Management funding authority indicated by the codes to authorize payment to Westinghouse for Plant expenditures unrelated to Building Construction.

Becker filed this suit, averring that Westinghouse had wrongfully retained and used government funds and had created false records to conceal this conduct in violation of §§ 3729(a)(4) and (a)(7) of the FCA.[9] The government investigated the allegations in Becker's complaint but declined to intervene, giving Becker the right to conduct the action *qui tam*. 31 U.S.C. §§ 3730, 3730b.

During the protracted course of discovery, Becker learned that documents divulged by DOE pursuant to Becker's Freedom of Information Act requests had been provided to DOE by Westinghouse. In a letter to the district court outlining the progress of discovery, Becker argued that the fact that Westinghouse originally possessed the documents was relevant to whether Becker's suit was prohibited under the FCA's public disclosure bar. *See* 31 U.S.C. § 3730(d)(4)(A). Becker requested that the district court order Westinghouse to produce a witness to testify

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[9] Becker also alleged that Westinghouse misrepresented the costs of the Building Construction to the government in violation of §§ 3729(a)(1), (a)(2) and (a)(7), but withdrew those claims and does not appeal the district court's dismissal of them.

about the exchange of documents between Westinghouse and DOE and the origin of those documents. In an order filed July 11, 2002, the district court denied the request without comment.

On August 7, one week before the close of the scheduled discovery period, Westinghouse moved for summary judgment. The following day, Westinghouse served Becker with the affidavit of John Pescosolido, Chief Financial Officer for DOE's Savannah River Operations. On September 4, more than three months after Westinghouse served Becker with documents and objections responsive to Becker's discovery requests, Becker moved to compel the production of two types of accounting documents mentioned by Pescosolido in his affidavit.

The district court granted Westinghouse's motion for summary judgment and denied as untimely Becker's motion to compel discovery. Becker moved for reconsideration, which the district court denied.

Becker timely appeals the summary judgment in favor of Westinghouse, the denial of Becker's motion to compel discovery, the denial of Becker's request that the court order Westinghouse to produce a witness, and the denial of Becker's motion for reconsideration. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

II

We review de novo the district court's summary judgment in favor of Westinghouse. *See Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). Summary judgment may be granted only when the record evidence, construed in the light most favorable to the nonmovant, shows that "there is no genuine issue as to any material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). A "genuine issue" exists if a reasonable jury could return a verdict for the non-movant. *Owen v. Carpenter's Dist. Council*, 161 F.3d 767, 770 (4th Cir. 1998). We may affirm summary judgment on any ground supported by the record. *Brown v. Trans World Airlines*, 127 F.3d 337, 343 (4th Cir. 1997).

Section 3729(a)(7) of the FCA imposes civil liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." A person acts "knowingly" if he or she knows the record or statement is false or acts in deliberate ignorance of, or with reckless disregard for, the truth or falsity of the record or statement. 31 U.S.C. § 3729(b). Subsection (a)(4) imposes civil liability on any person who "has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt." Subsection (a)(7) requires proof of specific intent to defraud the

government or conceal property, not merely proof of knowing creation of a false record or statement.

Becker argues that Westinghouse violated § 3729(a)(4) and (a)(7) by acquiescing to DOE's instructions to change the Budgeting and Reporting codes. He contends that Westinghouse changed the Budgeting and Reporting codes while in deliberate ignorance of the existence or lack of Congressional authority for the appropriations transfer or with reckless disregard for whether such authority existed. Becker argues that changing the codes concealed from the government the fact that the appropriations were originally designated for Defense Programs accounts, and that the change enabled Westinghouse to request and receive disbursement from those appropriations for a purpose other than that for which the appropriations were originally authorized.

We find Becker's argument problematic. It is possible to infer from the evidence that, when changing the Budgeting and Reporting codes, Westinghouse at least negligently disregarded whether Congress had approved the appropriations transfer. Yet DOE had at least as much knowledge as Westinghouse regarding Congressional authority for the transfer and nonetheless instructed Westinghouse to change the codes.

Durcholz, decided by the Seventh Circuit, is factually similar to this case. There, a government military facility needed a sedimentation pond to be quickly dredged. *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 543 (7th Cir. 1999). To speed the

process, a facility official instructed the contractor to submit invoices for unperformed excavation work instead of invoices for dredging. *Id.* at 544. The contractor complied, dredged the pond, and was paid by the facility. *Id.* Durcholz brought suit as relator for the United States, alleging that the contractor knowingly submitted false claims to the government. The Seventh Circuit upheld the district court's summary judgment for the contractor, reasoning that

> [i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA. . . . *We decline to hold [defendant] liable for defrauding the government by following the government's explicit directions.*

Id. at 545 (emphasis added).

Besides the Seventh, at least three other circuits recognize that prior government knowledge of an allegedly false claim can negate the scienter required for an FCA violation. *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000); *see also United States v. Southland Mgmt. Corp.*, 288 F.3d

665, 686 (5th Cir. 2002) (rejecting government knowledge defense but noting that such a defense would be viable "where the falsity of the claim is unclear and the evidence suggests that the defendant actually believed his claim was *not false* because the government approved and paid the claim with full knowledge of the relevant facts"). The relevance of the government's knowledge of an allegedly false claim has not been addressed in this Circuit since the 1986 amendments to the FCA.[10] Today, we join with our sister circuits and hold that the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.

Becker essentially contends that in changing the Budgeting and Reporting codes, Westinghouse implicitly represented to the government that the appropriations were authorized for Environmental Management purposes. In following DOE's instructions, however, Westinghouse properly relied on DOE's knowledge of Congressional authority for the appropriations transfer gleaned from DOE's communications with Congress. *Cf. United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1238 (11th Cir. 1999) (noting that contractor in unauthorized possession of government property must return it or "otherwise dispos[e] of it in accordance with the government's

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[10] Before the 1986 amendments to the FCA, full government knowledge of the facts underlying a *qui tam* action precluded the district court's jurisdiction to hear the suit. 31 U.S.C. § 3730(b)(4) (1982).

instructions"). DOE's full knowledge of the material facts underlying any representations implicit in Westinghouse's conduct negates any knowledge that Westinghouse had regarding the truth or falsity of those representations.

Becker failed to raise a triable issue that Westinghouse knowingly made a false record or statement pursuant to § 3729(a)(7) and necessarily failed to raise a triable issue on the more stringent specific intent standard of § 3729(a)(4). The district court properly granted Westinghouse's motion for summary judgment.

III

A.

Becker challenges two discovery rulings made by the district court: the September 28 order denying Becker's motion to compel production of documents mentioned in Pescosolido's affidavit, and the July 11 order denying Becker's request that Westinghouse provide a witness to testify about document exchanges between Westinghouse and DOE during discovery. Becker contends that the evidence he sought would have been relevant to Westinghouse's knowledge of Congressional authority for the funds transfer. We afford substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of that discretion. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

The district court denied as untimely Becker's September 28 motion to compel discovery. Local Rule 37.01 of the District Court for the District of South Carolina states that "[m]otions must be filed within twenty (20) days after receipt of the discovery response to which the motion to compel is directed." The district court has discretion to consider an untimely motion to compel if the movant "offer[s] an acceptable explanation for [the motion's] tardiness." *See Spencer Med. Assocs. v. Comm'r*, 155 F.3d 268, 273 (4th Cir. 1998). Becker concedes that his motion was untimely, but argues that his tardiness was justifiable due to "the scope of discovery" and the fact that Westinghouse "stated that it had produced all of the potentially responsive documents" in its responses to Becker's discovery requests.

The district court denied without comment Becker's request that the court order Westinghouse to produce a witness to testify about Freedom of Information Act exchanges between DOE and Westinghouse during the course of litigation. Becker contends that this denial precluded him from obtaining evidence relevant to Westinghouse's knowledge of Congressional authority for the funds transfer.

We need not determine whether the district court abused its discretion. As we have explained, DOE's full knowledge of the facts surrounding Westinghouse's alleged false statement negates the scienter required for violation of the FCA. DOE was the entity involved in appropriations discussions with Congress; Westinghouse could not have had any more knowledge about those discussions and their outcome

than DOE itself. Any evidence tending to show Westinghouse's knowledge of the truth or falsity of the claim is immaterial. Even if the district court erred in rejecting Becker's reasons why his motion to compel was tardy or why Westinghouse should be compelled to produce a witness, the error was harmless. *See* Fed. R. Civ. P. 61.

B.

Becker challenges the district court's denial of his motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). We review for abuse of discretion a district court's denial of a Rule 59(e) motion. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 402 (4th Cir. 1998).

There are three circumstances in which the district court can grant a Rule 59(e) motion: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Becker's motion did not point to newly discovered evidence or an intervening change in law that would justify altering or amending the judgment. The district court's summary judgment was legally correct and did not work a manifest injustice. "[M]ere disagreement does not support a Rule 59(e) motion." *Hutchinson v. Staton*, 994 F.2d 1076, 1082-83 (4th Cir. 1993). The district court properly denied the motion.

C.

The district did not err by denying Becker's motion for reconsideration. Any error committed by the district court in managing discovery was harmless.

IV

The district court properly entered summary judgment and denied Becker's motion to alter or amend the judgment. If the district court erred in denying Becker's motion to compel discovery or his request that the Court order production of a witness, that error was harmless.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

United States of America, ex rel. Martin Becker,
PLAINTIFF,

v.

Westinghouse Savannah River Company,
DEFENDANTS,

ORDER

C/A NO. 1:98-190-22
Filed: November 6, 2001
Entered: November 6, 2001

By order of this court entered September 28, 2001, the court found a total absence of evidence showing WSRC's knowledge of unauthorized transfers of uncosted funds. Accordingly, the court granted WSRC's Motion for Summary Judgment. On October 4, 2001, Relator Martin Becker moved, pursuant to Rule 59(e), Fed. R. Civ. P., for reconsideration of the September 28 order. After carefully reviewing the arguments of both parties in their briefs, and considering the applicable law, the court finds that Relator's arguments are without merit or foundation and do not constitute proper grounds for relief under Rule 59(e), Fed. R. Civ. P.

Rule 59(e), Fed. R. Civ. P. provides that, "A motion to alter or amend the judgment shall be served

not later than 10 days after entry of the judgment." Although Rule 59 addresses grounds for new trials, some courts have reasoned that the concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury. 11 Wright & Miller, Federal Practice & Procedure § 2804 (1973 & Supp. 1994) (citations omitted). Notwithstanding the broad nature of Rule 59, motions for reconsideration are disfavored. They are not a matter of routine practice. Settino v. City of Chicago, 642 F. Supp. 755, 759 (N.D. Ill. 1986). Several courts have observed that they are not expressly cognizable under the Federal Rules of Civil Procedure nor authorized by the local rules of the district court. See, e.g., Fisher v. Samuels, 691 F. Supp. 63, 74 (N.D. Ill. 1988). Despite the above constraints, such motions may be appropriate when, for example, "applicable law or known facts have changed since an issue was submitted to the court." National Union Fire Ins. Co. of Pittsburgh v. Continental Illinois Corp., 116 F.R.D. 252 (N.D. Ill. 1987).

Motions for reconsideration are inappropriate merely to introduce new legal theories or new evidence which could have been adduced during the pendency of the prior motion. Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656 (N.D. Ill.), aff'd, 736 F.2d 388 (7th Cir. 1982). The Fourth Circuit recognizes only three limited grounds for a district court's grant of a motion under Rule 59(e), Fed. R. Civ. P.: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice. Pacific Ins. Co. v. American Nat'l

Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). The Fourth Circuit has emphasized that counsel's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion. Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993) (citing Atkins v. Marathon LeTourneau Co., 130 F.R.D. 625, 626 (S.D. Miss. 1990)).

As another court of this district has stated,

> Rule 59(e) of the Federal Rules of Civil Procedure provides a mechanism for an aggrieved party to petition the Court to alter or amend a judgment under certain limited circumstances. The purpose of a Rule 59(e) motion "is to allow the court to reevaluate the basis for its decision." Keyes v. National R.R. Passenger Corp., 766 F. Supp. 277, 280 (E.D. Pa. 1991). Because of the interests in finality and conservation of judicial resources, Rule 59(e) motions "are not at the disposal of an unsuccessful party to 'rehash' the same arguments and facts previously presented." Keyes, 766 F. Supp. at 280; and "cannot be used to raise arguments which could, and should, have been made before the judgment issued," F.D.I.C. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); or to submit evidence which should have been previously submitted. Borvan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

Rouse v. Nielsen, 851 F. Supp. 717 (D.S.C. 1994) (Shedd, J.). Relator's arguments for reconsideration represent the same arguments addressed and disposed of by the court in its September 28, 2001, order.[11] Moreover, Relator's Motion for Reconsideration does not argue that an intervening change in the law has occurred, or that new evidence has come to light. Nor has Relator presented any grounds showing that reversal of the court's September 28, 2001, order is necessary to correct a clear error of law or prevent manifest injustice. See Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993). Because Relator has failed to satisfy any one of the three recognized grounds for relief under Rule 59(e), IT IS THEREFORE ORDERED that Relator's Motion for Reconsideration is denied.

IT IS SO ORDERED.

/s/ CAMERON MCGOWAN CURRIE

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[11] Relator argues (1) that the court overlooked evidence that Congress had failed to authorize a transfer of funds from the DP Account to the EM Account, citing an EOP Declaration attached as Exh. B to Relator's Opposition to Summary Judgment; and (2) that the court incorrectly found an absence of any evidence of scienter on the part of WSRC. In the first place, the court does not interpret the EOP Declaration in the fashion advocated by Relator. However, even if the Declaration could be construed as some evidence of Congress's failure to authorize the transfer in the manner suggested by Relator, this would not forestall grant of summary judgment and denial of Relator's motion for reconsideration. The second affidavit of John Pescosolido was uncontradicted by Relator insofar as it established that WSRC was not privy to discussions between Congress and DOE regarding the transfer of funds. Thus, even if the transfer proceeded unauthorized, Relator failed to demonstrate a material issue of fact as to WSRC's knowledge of it.

UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
November 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel Martin Becker,

Plaintiff - Appellant

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY
Defendant - Appellee

No. 01-2452
CA-98-190
Filed: October 22, 2002
Entered: October 22, 2002

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor - Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

United States of America,
ex rel. Martin Becker,
Plaintiff,

v.

Westinghouse Savannah River Company,
Defendant.

C.A. No. 1:98-190-22
Filed: September 28, 2001
Entered: September 28, 2001

ORDER

Martin Becker, "Relator," filed an Amended Complaint asserting claims under the False Claims Act, 31 U.S.C. § 3729, against Defendant Savannah River Company, hereinafter "WSRC." Following an investigation of the claims by the DOE Office of Inspector General and Department of Justice, the Government declined to intervene in Relator's action. However, Becker elected to proceed with the claims. On December 11, 1999, the court ordered that the Amended Complaint filed April 30, 1999, be unsealed and served upon WSRC. Service was thereafter effected.

The court is well familiar with the case because of the heavy volume of discovery and other motions

filed and the significant number of hearings conducted. Pursuant to the court's scheduling order, the period for discovery expired on August 15, 2001. A volley of motions then ensued.

The matter is before the court on numerous outstanding motions. Chief among them is: (1) WSRC's Motion for Summary Judgment, filed August 7, 2001, to which Relator responded by Opposition filed August 22, 2001, and a proposed Surreply submitted September 4, 2001.[12] Other pending motions include: (2) Relator's Motion for Protective Order, filed September 4, 2001; (3) Relator's Motion to Compel, filed September 4, 2001; (4) Relator's consolidated "Motion to Strike, or in the alternative, for Leave to File a Surreply and Contingent Rule 56(f) Request," filed September 4, 2001; (5) Relator's Motion to Amend the Amended Complaint, filed September 4, 2001; (6) Relator's Motion to Withdraw Jury Demand, filed September 13, 2001; and (7) Relator's Motion to Revise the Amended Scheduling Order, filed September 13, 2001.

The court has considered all materials in support of the pending motions, including the voluminous materials submitted by both parties in connection with the motion for summary judgment. For the reasons given below, the court finds that Defendant's Motion for Summary Judgment should be GRANTED. Disposition of the remaining motions is outlined in Section VI below.

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[12] The court has considered Plaintiff's proposed surreply in all rulings.

I. FACTS

The following facts are drawn from the complete record before the court.[13] All inferences are drawn in Plaintiff's favor. Under federal authority and contracts administered by the Department of Energy, WSRC is the manager and operator of the Savannah River Plant, a nuclear facility in Aiken, South Carolina. WSRC receives and expends federal funds for operation of the plant. WSRC submits its funding requests to DOE. If DOE approves the requests, that agency then submits the matter to the United States Congress for appropriation. At issue in Relator's current claim are the appropriations through Fiscal Year 1995 related to Line Items 92-D-150 ("Line Item 150") and Line Item 92-D-153 ("Line Item 153"), which furnished federal funds for the construction of three office and administrative buildings at the Plant. In those two line items, Congress appropriated over $55 million for the construction project. DOE, however, "obligated" or dedicated to WSRC only $53,761,000 for WSRC's construction costs. As it turned out, only $35,178,737 was needed to complete the construction, leaving substantial excess and unspent obligated funds. This amount is called a "stated construction underrun."

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[13] The court has omitted discussion of any facts pertinent to Relator's "cost" claim, i.e., that WSRC falsely represented project construction costs, because Relator has now abandoned this claim. The only facts set forth above pertain to what has been described as Relator's "reprogramming" claim, which Relator has recently fashioned into a "reappropriations transfer" claim, as discussed below in Section V.B.

WSRC has a duty to return to the United States any funds not used for a specified purpose. However, WSRC may use the obligated funds for purposes other than the stated purpose is such funds have been de-obligated and reprogrammed for other purposes. WSRC has no authority to obligate or de-obligate such funds; that is within the exclusive province of Congress or DOE. There are two methods to reprogram funds: (1) Congress itself may reprogram de-obligated funds; or (2) DOE may de-obligate prior year uncosted funds, return them to DOE-Headquarters, and then DOE-Headquarters may re-align those funds to current year requirements where it sees fit. In this case, DOE notified Congress of the stated construction underrun and attempted to reprogram the funds pursuant to the second procedure above, *i.e.*, the DOE budget reprogramming procedure.

The movement of uncosted balances at issue here occurred between DOE's Office of Defense Programs (DP) to its Office of Environmental Management (EM) in accordance with discussions between DOE and Congress. WSRC was not involved in these discussions or the decision as to how to reprogram. DOE Savannah River de-obligated the underrun, giving it back to DOE-Headquarters as "uncosted giveback." The Headquarters pooled the giveback with other DOE funds. It is unclear whether some or all of that giveback may have eventually been re-obligated to WSRC for other nonconstruction projects. Once a giveback is pooled with other DOE funds, it is technically impossible to determine what portion, if any, DOE re-obligated to WSRC for other purposes.

In this case, Relator claims the procedures governing de-obligation and re-programming of funds were not correctly followed.

II. PROCEDURAL HISTORY

Relator instituted this second suit[14] against WSRC alleging that WSRC had "wrongfully retained and used WSRC's Non-reprogrammed Underrun," Amended Complaint at ¶ 24, and that the underrun had "not been reprogrammed for expenditure for purposes other than the Building Construction." *Id.* at ¶ 25. Relator contended there was an $18.6 million underrun in completing Line Items 150 and 153. Relator believed that only $6 million of that underrun was ever reprogrammed properly, and that the balance of $12.6 million was knowingly spent by WSRC for unprogrammed purposes, *i.e.*, for purposes other than the building construction Congress authorized. Relator's reprogramming claim alleges that Relator knowingly made "false records indicating that the Non-reprogrammed Underrun should not be returned or transmitted to the United States." *Id.* at ¶ 44, in violation of 31 U.S.C. § 3729(a)(4), and that WSRC wrongfully retained non-reprogrammed underrun funds, "intending willfully to conceal the requirement to return it to the United States." *Id.* at § 47, in violation of 31 U.S.C. § 3729(a)(4). Specifically, Relator contends

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[14] Becker had an earlier lawsuit against WSRC in which he contended that WSRC violated the False Claims Act by understating the estimated costs of the building construction projects at issue in this case. When Becker learned that, in fact, the construction was completed under budget, he took a voluntary dismissal of this first lawsuit.

that WSRC misrepresented facts in charts attached to two memoranda, the "Fiori Memo" and the "Pescosolido Memo," (Exhs. B-10 & B-11), which show the Fiscal Year 1995 Building Construction uncosted balances in the EM Account. Relator prays for assessment of treble damages against WSRC, imposition of civil penalties, award of a relator's share of proceeds recovered by the United States, attorneys' fees and costs, as well as other equitable relief.

Defendant's Answer to Amended Complaint, filed August 2, 2000, denies all material allegations of the Amended Complaint. WSRC maintain that it discharged its responsibility by notifying DOE of the underrun, and allowing DOE-Headquarters to reclaim the underrun and reprogram those funds to other uses. Thus, WSRC insists all proper procedures were followed with respect to its obligations for appropriations and expenditures under Line Items 150 and 153.

III. SUMMARY JUDGMENT STANDARD

In deciding a summary judgment motion, the court must look beyond the pleadings and determine whether there is a genuine need for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-53 (1986). If the defendant carries its burden of showing there is an absence of evidence to support a claim, then

the plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-45 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the plaintiff. *Anderson*, 477 U.S. at 248. An issue of fact concerns "material" facts only if establishment of the fact might affect the outcome of the lawsuit under governing substantive law. *Id.* A complete failure of proof concerning an essential element of the plaintiff's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. Moreover, a "mere scintilla of evidence" in support of an essential will not forestall summary judgment. *Anderson*, 477 U.S. at 251.

In this instance, WSRC argues two distinct bases for grant of summary judgment. First, it argues that the court lacks subject matter jurisdiction over this action under 31 U.S.C. § 3730(e)(4)(A). Second, it contends that Relator's reprogramming claim fails on the merits because no material issue of fact exists that DOE properly de-obligated and reprogrammed all funds in accordance with Congressional authority. In the alternative, WSRC contends that even if the proper procedures were not followed by DOE, WSRC is not liable for that failure. The court first examines the subject matter jurisdiction element.

IV. SUBJECT MATTER JURISDICTION

The plaintiff in a FCA claim has the burden of establishing jurisdiction when jurisdiction is properly controverted by the opposing party. *United States v.*

Morrison-Knudsen Co., Inc., 577 F.2d 668 (9th Cir. 1978). The False Claims Act contains a "public disclosure bar" in 31 U.S.C. § 3730(e)(4), which deprives a federal district court of subject matter jurisdiction if the elements of the bar are met. This section states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

This bar reflects Congress's desire to prevent "'parasitic' qui tam actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir. 1994). Construing this provision, the Fourth Circuit has directed district courts to dismiss qui tam complaints in which three elements are satisfied: (1) the complaints are "based upon" information 2) that was "publicly disclosed" and 3) the relator is not the "original source" of the information. *Grayson v. Advanced Mgt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000). A relator's claim is "based upon" a public disclosure of allegations "only where the relator has

actually derived from that disclosure the allegations upon which his qui tam action is based." *Siller*, 21 F.3d at 1346-47. In determining whether information was "publicly disclosed," the court shall consider if it was conveyed "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). In *Siller*, the Fourth Circuit found that a corporate distributor's prior civil lawsuit against the manufacturer that granted its distributorship was a public disclosure within the meaning of the public disclosure bar. Similarly, the court held in *Grayson* that allegations contained in an administrative complaint filed with the Federal Aviation Administration were publicly disclosed.

Even where the first two elements of § 3730(e)(4)(A) are satisfied, the relator may still proceed with the FCA claim if he is an "original source" of the material. *Grayson*, 221 F.3d at 583. The relator must have "direct and independent knowledge of the information on which the allegations are based" and must have "voluntarily provided the information to the Government before filing [suit]." 31 U.S.C. § 3730(3)(4)(B). A putative relator's knowledge is "direct" if he acquired it through his own efforts, without an intervening agency, and it is "independent" if the knowledge is not dependent on public disclosure. *Id.*

WSRC contends that Relator's claim is barred because this suit is "based upon" a public disclosure, and that Relator is not an "original source" of the

information underlying the suit. Relator does not contest that most, if not all, of the substantive allegations of the Amended Complaint were derived from documents obtained by Relator pursuant to numerous Freedom of Information Act requests Relator directed to DOE prior to commencement of this suit. However, Relator argues the elements of the public disclosure bar are nevertheless unsatisfied. Relator submits that because the statutory bar does not expressly enumerate FOIA information as one of the sources for public disclosure, FCA suits derived from such information are not based upon public disclosures. Next, Relator argues that the statutory bar applies only to information containing "allegations or transactions," and that information Relator received was mere unadorned information, not allegations or transactions of fraud. Finally, Relator insists that even if the preceding prongs are met, he qualifies as an original source and, therefore, may press his claim.

The first question, therefore, is whether a FCA suit derived from information gleaned from FOIA requests is based upon a public disclosure of allegations or transactions. Some courts addressing this question have concluded that the specific FOIA information obtained in those cases occurred in an "administrative investigation" and constituted publicly disclosed information for purposes of 31 U.S.C. § 3730(e)(4)(A). *See, e.g., United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh,* 186, F.3d 376, 383-84 (3d Cir. 1999). There is some doubt, however, that the Fourth Circuit would subscribe to such an expansive interpretation of §

3730(e)(4)(A).[15] However, even assuming *arguendo* that the public disclosure element was satisfied, there exists a separate inquiry demanded by the statutory bar: was this public disclosure of "allegations or transactions." Such a disclosure requires the disclosure of "the elements of the underlying fraudulent transaction." *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997). "This means that the disclosure must reveal *both* the misrepresented state of facts and the true state of facts so that the inference of fraud may be drawn," *id.* at 741 (emphasis supplied).

The court concludes that none of the documents obtained by Relator pursuant to his numerous FOIA requests reveal *both* the allegedly misrepresented facts concerning the de-obligation and reprogramming of funds *and* the allegedly true state of facts. The court's examination of such documents, which comprise the bulk of exhibits offered in support of WSRC's motion for summary judgment, reveals that DOE supplied Relator with mere naked information, not information of "allegations or transactions." The court finds no inference of fraud evident from the voluminous FOIA documents received by Relator. Accordingly, the

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[15] Interpreting the scope of the public disclosure bar, the Fourth Circuit stated in *United States ex rel. Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999) quoting *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1494, 1499-1500 (11th Cir. 1991), that "we will not give the statute broader effect than that which appears in its plain language." The court in *Eberhardt* rejected the Defendant employer's claim that a public disclosure occurred when Defendant's representatives met with the State Department to discuss advance billing practices.

statutory bar does not apply here.[16] The court thus concludes it has subject matter jurisdiction over this action.

V. MOTION FOR SUMMARY JUDGMENT

A. Lack of Authority of WSRC over de-obligated funds

Defendant contends that it is entitled to summary judgment because there is no evidence that it retained any obligated funds in excess of project costs. It argues that all funds were de-obligated by DOE from WSRC's contract and returned to DOE. Defendant states that because there is no material issue of fact that WSRC, a contractor, fully discharged all of its duties as to obligated funds, it is entitled to summary judgment on Relator's claims.

The evidence supporting Defendant's position is persuasive. John Pescosolido, Chief Financial Officer for DOE-Savannah River Operations, explained that Congress appropriates to DOE a specified amount of funds for government construction projects, such as those at issue here. Aff. Pescosolido at ¶ 3. DOE may thereafter obligate all or a portion of the appropriated amount to the Management and Operations contractor, WSRC, for projects at the Savannah River Site. Mr. Pescosolido further stated that, "under the M & O contract between DOE and WSRC, WSRC has no authority to use appropriated funds that have not been

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[16] In light of the court's finding as to this element, the court need not address whether Becker was an "original source" of the information.

formally obligated to the contract." *Id.* at § 4. The court also has before it the affidavit of Louis J. Rubino, Jr., Defendant's government contracting consultant, which agrees that, "a government contractor has no control over or responsibility for funds which have been de-obligated." Aff. of Rubino, at ¶ 6.

> Turning to the specific contract at issue here, Mr. Pescosolido states that:
>
> Under the M & O contract, DOE may de-obligate funds formerly obligated to WSRC for a project. WSRC has no authority to obligate or de-obligate funds. DOE-SR notifies WSRC of de-obligations by way of the Financial Plans. In addition, all de-obligations require formal modifications of the M & O contract.
>
> Once DOE de-obligates funds, WSRC has no control over them or responsibility for them whatsoever.

Id. at ¶ 5 & 6. Mr. Pescosolido further explained that in the present case all unused funds obligated to Line Items 150 and 153 were de-obligated by DOE. Thereafter, DOE could, if it chose, re-obligate de-obligated funds by either requesting Congress to reprogram the re-obligated funds, or by re-allocating itself any prior year uncosted balances to current year projects, pursuant to Congressional authority. *Id.* at ¶ 9 & 10. Mr. Pescosolido concluded that of all of the de-obligated, uncosted balances from Line Items 92-D-150 and 92-D-153, "it is technically impossible to determine

what portion, if any, DOE re-obligated to WSRC." *Id.* at 11. Defendant argues that because DOE retained exclusive control over de-obligated funds, no basis exists for Relator's claim that WSRC wrongfully retained or used funds originally obligated to the construction projects, as alleged in the Amended Complaint. Plaintiff has submitted nothing to controvert WSRC's evidence as to DOE's exclusive authority to obligate and de-obligate funds.

B. Leave to Amend Complaint to file Second Amended Complaint

Recognizing the insurmountable challenges presented by evidence of DOE's exclusive authority, Becker has attempted to refine and reshape his "reprogramming" theory into an "appropriations transfer" theory. In a Motion for Leave to Amend filed September 4, 2001, and a proposed "Second Amended Complaint," Relator now avers that "the Total Non-reappropriated Funds were appropriated in one appropriation account and were transferred by non-congressional entities to another appropriation without the required authority." Proposed Second Amended Complaint at § 16, appended to Relator's Motion to Amend, filed 9/4/01. Relator contends that WSRC knew that DOE had improperly executed its appropriation duties over the de-obligated funds, but knowingly spent the funds for improper purposes and created records to conceal the act. Relator insists that the proposed Second Amended Complaint does not raise new theories, but simply uses the term "re-appropriation" in a more precise technical manner that

the formerly used "reprogramming" term.[17] In other words, Relator argues the proposed shift is more of a semantic change to conform with the evidence discovered and parties' arguments. Relator's expert's report opines that because a specific tracking of any and all DOE reprogrammed funds cannot be isolated, "there is a question whether they were actually transfers between appropriations accounts that required explicit congressional authority" that was not obtained. Def's Exh. C at 12. Relator contends that material issues of fact exist under this theory as to: (1) whether, if DOE re-obligated to WSRC's EM Account the de-obligated funds, it had legal authority to do so; and (2) whether WSRC had "knowledge" that because of DOE's omission it was applying funds to unauthorized purposes because DOE failed to obtain the proper re-appropriation transfer authority from Congress.

Relator's re-titled theory is one which seeks to impose liability on WSRC for its acquiescence in DOE's more active alleged wrongdoing in exceeding any reprogramming powers it possessed. The court finds that Relator's new "reappropriation transfer" claim is not markedly different from his prior theory: both theories rest on assertions that the proper permission to spend funds as directed by Congress was not secured. Although Defendant contends Relator's theory is a

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[17] Relator's expert's report, Exh. C to Defendant's motion for summary judgment, states that the term "reprogramming" refers to shifts of funds within an individual appropriations account whereas "appropriation transfers" refer to shifts of funds between different appropriations accounts.

totally novel theory, the court finds this contention exaggerated. The gravamen of both claims is the same.

As a threshold matter, Defendant contends it is simply too late for Relator to be altering, once again, his theory of recovery against WSRC for alleged wrongdoing arising out of Line Items 150 and 153. Relator engaged in several years of formal and informal discovery of his claims. He has instituted two different qui tam actions against Defendant to date, abandoning his first claim after he learned that there was no factual basis for his original assertions that WSRC exceeded obligated funds for certain construction costs. Undeterred, Relator submitted more FOIA requests to WSRC in an attempt to unearth a viable claim. The present, second qui tam action originally asserted both a reprogramming and a cost claim. Relator has now totally abandoned his cost claim, and is attempting to rename his "reprogramming" claim as a "reappropriations transfer" claim.

A better explanation of Relator's "reappropriations transfer" theory is contained in his expert's final report, Exh. C to Def's "White Notebook" submitted in support of summary judgment. There, Relator's expert speculates that:

> Finally, there is an unresolved question as to whether certain of the "reprogramming" actions were, in effect, appropriations transfers. The reprogramming action of June 29, 1995, transferred $2 million from the funds

> obligated for the Operations Support Facility (92-D-15) from the "Materials Support and Other Defense Programs" Appropriations Account to the "Defense Environmental Restoration and Waste Management" Appropriations Account. This action implies that the remaining uncosted balances of funds for this facility remained in the Materials Support Account. However, all future reprogrammings were represented within the Defense Environmental Restoration and Waste Management Account, implying that all remaining uncosted balances for the project were in this account. The documentation provided by DOE does not provide information on whether and when the uncosted balances were transferred to the Defense Environmental Restoration and Waste Management Account. If the balances were not transferred, the subsequent reprogramming actions were actually appropriations transfers, which are subject to different requirements.

Def's Exh. C at 16. Thus, Relator's current theory alleges that because of *an unresolved question* an improper appropriations transfer *may have* been made by DOE and acquiesced in by WSRC. The speculative nature of Relator's expert's opinion is readily apparent.

Nevertheless, Rule 15(a), Fed. R. Civ. Proc., provides in part that, "leave shall be freely given when

justice so requires." Notwithstanding the liberal provisions of Rule 15, however, a district court may deny a motion to amend a pleading where the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile. *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999). Absent prejudice or evidence of bad faith, undue delay is insufficient justification, though, for denying a motion to amend. *Ward Elec. Serv., Inc. v. First Comm. Bank*, 819 F.2d 496 (4th Cir. 1987).

It should be noted that the Amended Complaint does refer to "re-appropriated" funds, thus providing WSRC with some notice that re-appropriation (rather than reprogramming) was at issue in Relator's claim. However, even if it is concluded that Relator unduly delayed re-naming or more clearly defining his current theory of recovery, as espoused in his proffered expert's opinion filed July 25, Defendant has still failed to identify any prejudice if suffered from the delay or establish how Relator's assertion of the "appropriations transfer" claim constitutes bad faith. Defendant has not asserted that it was unable to respond to Relator's "appropriations transfer" theory (indeed, Defendant fully addressed the claim on the merits in its Reply brief, filed August 29, 2001, on pages 6-10. Defendant has not contended it was unable to examine Relator's expert fully on the appropriations claim, or that proceedings in this case will be delayed as a result of the new theory. Accordingly, the court finds that the liberal provisions of Rule 15 dictate that Relator's Motion for Leave to Amend complaint, filed September 4, 2001, be GRANTED.

C. The Merits of Relator's Re-appropriation Theory

i. Generally

The two affidavits of John Pescosolido, referred to above, unequivocally establish the futility of attempting to trace the precise amount, if any, of uncosted giveback that was pooled with other funds and perhaps eventually re-obligated to WSRC. Thus, in the remainder of this order, the court will assume without deciding that DOE authorized transfers between appropriations accounts from the uncosted giveback. The question arises, therefore, whether liability can be imposed on WSRC for such occurrence. After examining all of the evidence and considering the parties' arguments, the court finds no material issue of fact exists that: (1) DOE obtained all necessary Congressional approvals to transfer funds between appropriations accounts: (2) that even assuming *arguendo* that all necessary approvals had not been obtained, DOE's omission could not be imputed to WSRC. There is simply no evidence suggesting that WSRC knew, or should have known, that all appropriate Congressional approvals had not been obtained. Accordingly, summary judgment will be entered for Defendant on Relator's FCA claim.

ii. The Record Unequivocally Establishes that all Necessary Approvals Were Obtained by DOE for Any Transfers Between Appropriation Accounts

The court finds that Relator's expert's idle speculation that all necessary approvals *might not* have been obtained is nothing more than speculation that resulted from the expert's failure to review any documents manifesting the approval, and his failure to request copies of any such documents from DOE or Congress. However, uncontroverted evidence exists that such approvals were, in fact, affirmatively obtained. As explained in the Second Pescosolido Affidavit, DOE-SR's Chief Financial Officer stated that DOE had informed Congress about an appropriations transfer and that the transfer of funds resulted from negotiations between Congress and DOE. Second Pescosolido Aff. at ¶¶ 2 & 5. The uncosted balances at issue in this case were transferred from DP (DOE's Office of Defense Programs") to EM (DOE's Office of Environmental Management) after full DOE disclosure to Congress and Congress's authorization, as reflected in the Conference Report on the Energy and Water Appropriations Act for Fiscal Year 1996. *Id.* In Title III of the Report, in a section entitled "Atomic Energy Defense Activities," the Report noted: "The conference agreement includes the use of $667,240,000, of prior year balances..." BN Vol. II, Exh. B-7 at 68. The preceding figure included the uncosted balances at issue in this case. Second Pescosolido Aff. at ¶ 5. From this uncontroverted evidence, the court finds no basis

for Relator's contention that unauthorized appropriations transfers were effected.

iii. Even assuming unauthorized appropriations transfers were made by DOE, no basis exists for imputing knowledge of the lack of authorization to WSRC

To establish the scienter requirement of the FCA, a relator must show that a person, with respect to information: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). *See also Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996) ("*Hagood II*"). "The requisite intent is the knowing presentation of what is known to be false." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 416, 421 (9th Cir. 1991). "Known to be false," as used in the FCA, does not mean scientifically untrue or incorrect as a matter of proper accounting methods, but rather means a lie. 31 U.S.C. § 3729(b); *Hagood II*, 81 F.3d at 1478.

In *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), a former Army Corps of Engineers employee brought a qui tam action alleging that the county water agency, acting as the local sponsor and contractor under a federal water supply project, presented a false claim to the government concerning a dam project. The district court granted the water agency's motion for summary judgment,

finding that the former employee had failed to show the county's knowledge of an allegedly false claim. The Ninth Circuit affirmed the district court. There the evidence had shown that there was a dispute within the Army Corps of Engineers on the precise manner in which the cost allocation between the water agency and the Corps should be accomplished. In the qui tam action against the water agency, the district court and Ninth Circuit agreed that neither the fact that the agency knew that the Corps' reallocation responsibilities were unclear nor the fact that the Corps told the agency that a new cost allocation would not be required after modification of the project demonstrated scienter of a false claim by the water agency, even if the Corps's approach had been incorrect.

Similarly, here Relator has submitted nothing remotely suggesting, much less demonstrating, scienter of a false claim by WSRC. The only evidence Relator points to as suggesting scienter is: (1) WSRC's assignment of new "B&R" codes in its accounting system for the transferred funds; and (2) two memos, referred to as the "Chaput Memo," BN Exh. B-8, and the "Fiori Memo," BN Exh. B-10. The court finds none of this evidence probative of scienter on the part of WSRC.

Relator contends that through the assignment of "B&R" codes, WSRC concealed the unauthorized transfer and use of funds from the DP Account to the EM Account. However, as the Second Pescosolido Affidavit demonstrates, "B&R Codes are created by DOE, not WSRC. After creating the codes, DOE requires WSRC to insert them into its accounting

system." Pescosolido Aff. at ¶ 3. Relator cites no evidence suggesting that WSRC was given any reason to believe that DOE's express instructions to use such codes was designed to further any concealment of an unauthorized appropriations transfer. Accordingly, this evidence does not assist Relator.

As to the "Chaput Memo," dated November 29, 1995, Relator insists that the statement "SR has recently been made aware of an unresolved issue at DOE Headquarters (HQ) regarding . . . the treatment of uncosted balances within the Defense Program (DP) controlled Materials Support account," BN B-8 at 1, somehow demonstrates scienter by WSRC. In the first place, the memo's-author is a Deputy Manager for DOE, not WSRC, and he is writing an internal memo directed only to other DOE employees. Thus, there is no showing that WSRC actually received the memo. However, even assuming the Chaput Memo's contents were somehow transmitted to a WSRC employee, at best the memo demonstrates only that a WSRC employee might have been on notice that an ongoing debate existed at that time as to the proper procedure for uncosted balances. This is quite similar to the situation prevailing in *Hagood* in which the water agency was also aware of a debate within the Corps of Engineers. As the court there found, such general awareness of a viable dispute falls far short of the "known to be false" standard required for FCA liability. This court similarly finds Relator's evidence inadequate.

Relator contends the Fiori Memo, BN Exh. B-10, demonstrates WSRC's scienter. Again, the Fiori Memo,

written November 20, 1995, is written by a DOE manager and directed only to other DOE employees. At best, the Fiori Memo is a characterization by a DOE employee of the state of mind of WSRC employees on the issue of uncosted balances. It is hornbook law that one witness is not competent to provide evidence as to another person's state of mind. Thus, this evidence would be inadmissible for the purposes for which Relator attempts to use it. However, even if the evidence was admissible, its probative value is negligible because of the ambiguous language of the document. This evidence does not assist Relator.

Accordingly, the court finds a total absence of evidence proving WSRC's knowledge that appropriate Congressional authorizations had not been secured by DOE as to the handling of uncosted funds. Therefore, the court will GRANT Defendant's motion for summary judgment, Docket 71-1, on this ground as well.

VI. OTHER PENDING MOTIONS

In a Motion for Protective Order filed September 4, 2001, Docket 88-1, Relator sought production of certain DOE documents beyond the close of discovery. Relator also proposed confidentiality terms to govern the use of the documents. The court finds the request untimely. The motion is DENIED.

In a Motion to Compel filed September 4, 2001, Docket 89-1, Relator sought production of WSRC Material History Ledgers and certain voucher records. Again, the court finds Relator did not timely move

under Local Rule 37.01 to compel production within 20 days after his receipt of the discovery response to which the motion to compel is directed. It is too late to resurrect the request, and, accordingly, it is DENIED.

In Section V.B. above, the court addressed and GRANTED Relator's Motion to Amend, filed September 4, 2001, Docket 93-1.

As to the Motion to Strike Defendant's Reply or, in the alternative, for leave to file a Surreply, filed September 4, 2001, Docket 92-1, the court grants the motion, in part. The court GRANTS Relator's Motion insofar as he seeks permission to file a Surreply. Relator attached a proposed surreply to his Motion to Strike, and the court has considered it. The motion is DENIED in all other respects.

Relator's Motion to Withdraw his Jury Demand, filed September 13, 2001, Docket 101-1, is MOOT in light of the court's ruling granting Defendant's Motion for Summary Judgment.

Relator's Motion to Amend the Scheduling Order, filed September 13, 2001, Docket 102-1, is MOOT for the same reason cited above.

IT IS SO ORDERED

/s/CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
September 28, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,
ex. rel. Martin Becker,
Appellant.

v.

Westinghouse Savannah River Company
Appellee.

CASE NO. 01-2452

APPELLANT'S PETITION FOR REHEARING WITH PETITION FOR REHEARING *EN BANC*

Pursuant to Fed. R. App. P. 40 and Fed. R. App. 35, Appellant Martin Becker ex rel. United States of America (hereinafter "Appellant"), respectfully requests reconsideration by the panel or *en banc* the opinion issued in this action September 27, 2002 (hereinafter "the Opinion").

STATEMENT OF PURPOSE

Pursuant to Fed. R. App. P. 35 and Local Rule 40(b), undersigned counsel state that, in their judgment, reconsideration of the panel opinion is appropriate for the following reasons:

1. The panel decision conflicts with the United States Supreme Court decisions in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) and

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) and the conflict is not addressed in the panel opinion.

2. The proceedings involve significant questions of exceptional importance, including (a) whether the 1986 amendments to the False Claims Act, 31 U.S.C. § 3729 et seq., specifically eliminating the governmental knowledge bar, permits an affirmative defense of government knowledge under the Act; and (b) public policy questions of national important affecting the power of government contractors to use restricted government appropriated funds for unauthorized purposes in light of the appropriation statutes, 31 U.S.C. §§ 1301, 1307, 1352, and the Anti-Deficiency Act, 31 U.S.C. § 1341.

3. Material facts were overlooked or misapprehended in the panel decision, namely that the record does not support the contention that the United States Department of Energy (hereinafter "DOE") provided Westinghouse Savannah River Company (hereinafter "WSRC") with directions or instructions to change code classifications 92-D-150 & 153 in the preparation of false records provided to DOE for budget reporting purposes.

4. Material legal matters were overlooked in the panel decision, particularly settled United States Supreme Court authority that the expenditure of funds from the federal treasury is limited to those expressly authorized by statute and that advice and/or knowledge by government officials may not operate as an estoppel against the government to hold a contractor liable for the unauthorized use of government funds.

BACKGROUND

Relator filed suit in the United States District Court for the District of South Carolina, claiming that WSRC violated the Act by spending funds left over from those authorized and appropriated by Congress to finance a building project for other purposes with knowledge that it lacked the required Congressional authorization.

Under a contract with DOE, WSRC is the management and operations (M&O") contractor for the federally owned nuclear installation at the Savannah River Site near Aiken, S.C. ("SRS"). In FY 1992-1995, Congress expressly authorized DOE by specific statutory line items to fund construction of three administration and operations buildings at SRS (the "Building Construction"). Following completion of the Building Construction, there were at least $12 million in funds left over from those authorized and appropriated by Congress for the Building

Construction (the "Excess Funds"). In 1996 and 1997, WSRC spent the Excess Funds for purposes other than the Building Construction.

In previous years, consistent with Congressional practice and procedure, DOE had obtained Congressional authorization for different use of funds in excess of that required for specified purposes by proposing and receiving authority from Congress to reprogram such funds for such other uses. It had particularly followed this practice and procedure for FY 1992 through 1995 for funds in excess of those needed for the Building Construction.

For FY 1996, however, instead of following the Congressional reauthorization procedure, DOE transferred the Excess Funds and other excess funds for that year were transferred from the account into which they had been appropriated (the "DP Account") to another appropriation account (the "EM Account") where they could be used for other purposes.

WSRC wanted to use those FY 1995 balances for application in FY 1996 to EM Account costs incurred by WSRC at its Savannah River Site ("SRS"). WRSC knew of the required process for the treatment of the FY 1996 Excess Funds; but notwithstanding the wrongful appropriations transfer spent the Excess Funds for unauthorized purposes.

Relator's qui tam action arises upon the fundamental constitutional provision that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law,..." U.S. CONST. art. I, § 9, cl. 7.

ARGUMENT

A. THE PANEL DECISION OVERLOOKED AND CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT THAT ADVICE AND/OR KNOWLEDGE OF GOVERNMENT OFFICIALS MAY NOT OPERATE AS AN ESTOPPEL OF THE IMPROPER EXPENDITURE OF FEDERAL FUNDS NOT PROPERLY AUTHORIZED BY STATUTE.

In Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), the United States Supreme Court held that the government could not be estopped from denying benefits that were inappropriate under federal law even where government officials provided erroneous advice concerning the scope of the disability payments at issue. Underlying the basis for denial of the defense of estoppel against the government was the Court's express recognition that federal appropriations may only be spent upon specific Congressional approval. In reaching this conclusion, the Court relied upon a long line of cases dating back to Utah Power & Light v. United States, 243 U.S. 389 (1917), which the Court in Richmond quoted for the proposition that "it is enough to say that the United States is neither bound nor

estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Richmond, 496 U.S. at 420.

The Opinion further conflicts with the United States Supreme Court decision of Heckler v. Community Health Services of Crawford Cty, 467 U.S. 51 (1984), wherein the Court noted the independent duty of contractors and stated that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." Heckler, 467 U.S. at 63 (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947)).

In the case at bar, the panel decision overlooks this Supreme Court precedent and its resulting decision conflicts with this precedent. The basis of Appellant's claim, like the basis of the decision in Richmond, rests on the premise that no expenditure of federal funds may be accomplished absent express Congressional approval. The reasoning of the panel opinion upholding the district court grant of summary judgment conflicts with the decision in Richmond by effectively applying the doctrine of estoppel against the government by asserting that governmental knowledge of the transfer of funds negates the applicability of the False Claims Act.

B. THE PANEL DECISION OVERLOOKS OR MISINTERPRETS KEY FACTS, SPECIFICALLY THAT THE DOE DID NOT GIVE WSRC ANY DIRECTIONS OR INSTRUCTIONS TO CHANGE CODE CLASSIFICATIONS IN THE PREPARATION OF FALSE RECORDS PROVIDED TO DOE FOR BUDGET REPORTING PURPOSES.

The Court, in affirming the district court summary judgment on the basis that DOE had knowledge of WSRC's change in the IBAR accounting system to reflect the DP restricted funds as EM unrestricted funds and directed or instructed WSRC to make such change in the budgeting and reporting codes, as asserted without evidentiary support by WSRC in its brief at page 10, it is respectfully submitted, with all deference, the Court overlooked that the entire record is void of evidence (or an only inference therefrom) that DOE, either had knowledge of the falsity of the change in the B&R accounting system, instructed, directed or had the legal power to instruct or direct WSRC to make false entries in its accounting and reporting systems for budget purposes, and particularly overlooked that:

1) The budgeting and reporting codes which were falsified by WSRC is a "stand alone contractor system - a set of books," the bookkeeping of which is done only by WSRC, from where information is extracted and prepared by WSRC and reported to DOE for budget purposes.

DOE does not input to the system. (Pescosolido dep. 12-13 - J.A. 2444-2445). (Mathis dep. 63-64 - J.A. 0187-0188).

As demonstrated in the Pescosolido deposition:

> A. So, in other words, the Department of Energy does not do its bookkeeping for its part of the business on the contractor's IBAR system.
>
> Q. You extract from the IBAR system?
>
> A. Yes.
>
> Q. You input to it?
>
> A. No, we do not.

Pescosolido Dep. 12 - 13 - J.A. 2444-2445

2) WSRC knew that the funds at issue cannot be used for other than building purposes without congressional approval, (Mathis dep. 162-163 - J.A. 0286-0287), but nevertheless used the funds for unauthorized purposes.

3) DOE also knew that restricted funds cannot be transferred or used for other purposes without congressional approval, (J.A. 2456), but was misled by the false identification of the funds.

4) At the time of the removal (transfer) of the funds at issue, because of the false representation of the funds as EM funds in the report prepared by WSRC and provided to DOE for budget purposes, a fair inference therefrom is that DOE was misled to believe and consider the removal of the funds to the EM account as a reallocation, not as a "transfer" - "a situation where uncosted balances were pretty much retained within an appropriation account". (Pescosolido dep. 19-20 - J.A. 2451 & 2452).

5) However, since WSRC itself prepared the false report provided to the DOE for budget purposes, and in its dual capacity as manager of the DP appropriation account when the funds were removed and as manager of the EM account when the funds were received WSRC well knew that the transfer required congressional approval but, notwithstanding, used the funds for purposes other than building construction in violation of the requirements of 31 USC § 1301, 1307, 1307, 1352 and did so with knowledge as defined by 31 USC § 3729(b) and as provided therein by the 1986 amendment "no proof of specific intent to

defraud is required," which would be applicable even if assuming, but not agreeing, that DOE directed WSRC to falsify the records. (Also see Hezir declaration J.A. 2652-2662 regarding process employed to transfer funds without congressional approval.)

6) The funds at issue were used by WSRC as an offset to cover a shortfall of prior year balances in the EM account while WSRC managed the account.

In failing to address these key factual issues demonstrating that DOE lacked knowledge of the underlying false entries, the panel decision misapplies the stated precedent from other circuits "that government knowledge of an allegedly false claim can negate the scienter required for an FCA violation." Opinion at 7 (citations omitted). Even assuming that government knowledge may constitute a defense under the Act by demonstrating some relevance to a defendant's state of mind, Courts have expressly limited such a claim to instances in which complete disclosure exists.

As stated by the Second Circuit in United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir.), cert. denied, 508 U.S. 973 (1993):

> The fact that a contractor has **fully disclosed** all information to the Government may show that the

> contractor has not 'knowingly' submitted a false claim, that is, that it did not act with 'deliberate ignorance' or 'reckless disregard for the truth.'

Kreindler & Kreindler, 985 F.2d 1157 (emphasis added).

The panel opinion, recognizing that the issue of application of the government knowledge defense to the Act's 1986 amendments has not been addressed in this Circuit, panel opinion at 7-8, relied upon Kreindler & Kreindler and other authority without recognition of this important caveat. See also United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 326 (C.A. 9, 1995) (government knowledge not complete defense; must show government knowledge of all facts); United States v. Bald Eagle Realty, 1 F. Supp.2d 1311, 1316 (D. Utah 1998)(issue of negated intent does not arise where defendants fail to disclose information to the Government).

In short, the panel opinion in the case at bar (1) overlooks or misinterprets that DOE did not provide WSRC express instructions to change the code classifications in the preparation of false records provided to DOE for budget reporting purposes and (2) misapplies the cited precedent from other circuits by failing to recognize that a defense of government knowledge requires full and complete disclosure to the government, which does not exist in this matter.

Moreover, the issue herein was neither raised nor addressed in the district court. WSRC raised it

here for the first time in its brief at page 10. Indeed, WSRC's purported reliance on a DOE official's assertion is particularly remarkable since WSRC asserted in this Court that it is not affected by DOE's position. See, e.g., WSRC Brief at 9 n.4, 10. Since this issue was never raised at District Court, Appellant respectfully submits that remand may be necessary for further inquiry into the facts.

C. THE PROCEEDINGS INVOLVE SIGNIFICANT QUESTIONS OF EXCEPTIONAL IMPORTANCE, INCLUDING (1) WHETHER THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT, 31 U.S.C. § 3729, SPECIFICALLY ELIMINATING THE GOVERNMENTAL KNOWLEDGE BAR PERMITS AN AFFIRMATIVE DEFENSE OF GOVERNMENT KNOWLEDGE UNDER THE ACT WHERE A FULL AND COMPLETE DISCLOSURE TO THE GOVERNMENT DOES NOT EXIST; AND (2) PUBLIC POLICY QUESTIONS OF NATIONAL IMPORTANCE AFFECTING THE POWER OF GOVERNMENT AGENCIES AND ITS CONTRACTORS TO USE RESTRICTED GOVERNMENT APPROPRIATED FUNDS FOR UNAUTHORIZED PURPOSES IN LIGHT OF THE APPROPRIATION STATUTES, 31 U.C.C. §§ 1301, 1307, 1352, AND THE ANTI-DEFICIENCY ACT, 31 U.S.C. § 1341.

Prior to the 1986 amendments to the Act, a court lacked jurisdiction over an action if the government already possessed information underling the qui tam

action. 31 U.S.C. 3730(b)(4) (1982). Following the 1986 amendments, several courts across the country have examined the issue of whether government knowledge may constitute a valid defense to a qui tam action. As stated by the panel opinion at pages 7-8, the Fourth Circuit has not addressed this important issue. Appellant respectfully submits that this issue is particularly important where, as here, the panel opinion effectively adopted a position permitting a defense of government knowledge where no complete disclosure exist by Defendant. Appellant respectfully submits that the panel opinion, in crafting such a conclusion, has shifted the appropriate focus of the Act from a Defendant's state of mind to that of the government, an erroneous conclusion. In addition, in so creating such a defense, the panel opinion improperly adds to the Act a requirement that a Defendant possess an intent to deceive, a requirement lacking in the Act.

Additionally, this matter involves a matter of national importance pertaining to the ability of government officials and its contractors to use restricted government appropriated funds for unauthorized purposes. Appellant respectfully submits that the panel opinion provides for a contractor to improperly assert estoppel against the government in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, not only in express violation of the statute, but also contrary to the United States Supreme Court's holding in Hercules Inc. v. United States, 516 U.S. 417 (1996), where the Court

expressed that the government may not be bound by acts of its agents beyond the scope of their authority, including application of the Anti-Deficiency Act.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this petition for rehearing.

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October 11, 2002

No. 02-1107

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. MARTIN BECKER,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the court below properly ruled in accord with existing precedent that the government's knowledge and conduct are relevant to the requisite element of scienter under the False Claims Act (FCA)?

Whether the court below properly ruled in accord with existing opinions from other circuit courts of appeals that the government's knowledge and conduct can negate the requisite element of scienter under the FCA?

Whether the court below properly affirmed the summary judgment in this case based on Petitioner's failure to present evidence of the required elements of an FCA violation?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Westinghouse Savannah River Company respectfully submits the following disclosure statement:

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Westinghouse Savannah River Company, the managing and operating contractor for the United States Department of Energy, which owns Savannah River Site, is an affiliate of Westinghouse Government Services Company, L.L.C., a wholly owned subsidiary of Washington Group International, Inc.

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STATEMENT OF THE CASE

In the first sentence of his Statement of the Case, Petitioner Martin Becker erroneously suggests that his claim in this False Claims Act case has been consistent and well-defined since this dispute first arose. However, this suggestion ignores the history of the case, and a brief background on Becker's ever-evolving claim should assist the Court in understanding the issues.

Becker initially filed suit against Westinghouse Savannah River Company, LLC (WSRC) alleging that WSRC had underestimated the costs of certain building construction projects at the Department of Energy's Savannah River Site facility. When Becker learned that the projects were actually completed under budget, he dismissed this first claim and filed a second qui tam action alleging that WSRC had "wrongfully retained" approximately $12 million of the funds which were not used for the building construction projects. (App. 44.) In support of its motion for summary judgment on this claim, WSRC submitted uncontradicted evidence from DOE that all funds in excess of the building construction costs had been returned to DOE through a series of contract de-obligations. Further, the undisputed evidence showed that WSRC has no control over or responsibility for funds once they were de-obligated by DOE. (App. 51-53.)

As the district court recognized, Becker faced "insurmountable challenges" to his claims as a result of the uncontradicted evidence submitted by WSRC. (App. 53-54.) So, Becker attempted to "refine and reshape" his claim by asserting that even if all monies had been returned to DOE, DOE had improperly transferred certain of the returned building construction funds from

DOE accounts in the Office of Defense Programs (DP) to the Office of Environmental Management (EM). (Id.) While Becker admitted that WSRC could not be liable for the transfer itself, he asserted that WSRC had made some unspecified false statement or representation in connection with the alleged improper transfer because WSRC, at DOE's direction, changed the Budgeting and Reporting (B&R) codes contained in the joint DOE-WSRC accounting system to reflect the transfer. (App. 61-62.) Despite the fact that this claim was raised through an amended pleading after WSRC had moved for summary judgment, the district court allowed Becker to raise the claim but concluded that there was a total absence of evidence under any theory to support the elements an FCA claim. (App. 53–57, 63.) Therefore, the trial court granted summary judgment in favor of WSRC. (App. 63.)

On appeal, the United States Court of Appeals for the Fourth Circuit reviewed the trial court's findings and concluded that Becker's claim was without merit. The Fourth Circuit found that even if (1) DOE was uncertain about Congressional approval of the funds transfer; and (2) WSRC was aware of this uncertainty; and (3) WSRC received these transferred funds for purposes other than the building construction projects, WSRC could not be liable for any false statement in connection with the change in B&R codes because DOE had specifically directed WSRC to change the B&R codes and DOE, not WSRC, was the entity responsible for obtaining Congressional approval for the funds transfer.[1] (App. 7-

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[1] To the extent the Fourth Circuit actually concluded that the appropriations transfer was made without Congressional approval, that WSRC was aware of some question regarding the funds transfer, or that WSRC received transferred funds for projects other than the building construction projects, WSRC submits that such findings are unsupported by any evidence in the record.

12.) The Fourth Circuit, relying on cases from numerous other circuit courts of appeals, concluded that these undisputed facts negated the element of scienter required to establish a violation of the False Claims Act. (App. 12-14.)

REASONS FOR DENYING THE PETITION

A. This Court Should Deny The Petition Because The Decision Below Does Not Conflict With This Court's Precedent.

In an attempt to support his petition, Becker asserts that the opinion of the United States Court of Appeals for the Fourth Circuit in the present case "is squarely at odds" with the decision of the United States Supreme Court in Hughes Aircraft Co. v. United States ex. rel. Schumer, 520 U.S. 939 (1997). (Petition, 10.) Becker's assertion reveals a misunderstanding of both the Hughes opinion and the Fourth Circuit's opinion. As an initial matter, the holding of the Hughes case relates to the retroactive application of the 1986 amendments to the False Claims Act. This was not even an issue in the present case. Further, while it is true that this Court notes in the Hughes opinion that prior disclosure of the facts underlying an alleged false claim is no longer an absolute defense after the 1986 amendments to the FCA, the Fourth Circuit's opinion does not conflict with this holding because the Fourth Circuit did not suggest that prior disclosure of facts to the government is, by itself, a defense in this case. Instead, the Fourth Circuit held that the government's knowledge and actions related to an alleged false claim or statement are relevant to the issue of scienter and that the government's knowledge and actions can, in an appropriate case, negate the scienter required for an FCA violation. (App. 14.)

Based on this holding, the Fourth Circuit reviewed the undisputed facts in the present case regarding the government's knowledge and actions. Specifically, the Fourth Circuit recognized (1) that DOE, not WSRC, transferred $ 12 million dollars from DP to EM accounts[2]; (2) that DOE directed WSRC to change the reporting codes in the B&R system to reflect the transfer; and (3) that WSRC properly relied on DOE's statements that it had obtained approval from Congress for the transfer. (App. 8 - 9, 14.) The Fourth Circuit concluded that all of these facts taken together reveal that any alleged "implicit representation" made by WSRC through the B&R codes cannot possibly be considered a "knowing" false statement or false record under the FCA. (App. 14.) This conclusion does not conflict with the 1986 amendments to the FCA or the United States Supreme Court decision in Hughes.

B. This Court Should Deny The Petition Because No Conflict Exists Among the United States Circuit Courts of Appeals Regarding The Government Knowledge Defense.[3]

In his petition, Becker claims that the circuits are split on the issue of whether the government's knowledge of the falsity of a contractor's claim can bar an FCA action. (Petition, 10). Even a cursory reading

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[2] While the Fourth Circuit did not have to decide whether DOE's funds transfer was properly authorized, the transfer was permissible under 42 U.S.C. § 7269(b) which permits the transfer of unexpended balances of prior appropriations under the Energy and Water Development Act.

[3] Any assertion that the petition should be granted because some disagreement exists with regard to the application of equitable estoppel is without merit because the court below did not base any portion of its decision on the theory of equitable estoppel.

of the cases cited in Becker's petition reveal this assertion is without merit. There is uniform agreement in these decisions that the knowledge and action of the government can, in the appropriate case, provide a defense to an FCA action as the following quotes indicate:

> [T]here may still be occasions when the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000) (citations omitted).

> The fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim, that is, that it did not act with 'deliberate ignorance' or 'reckless disregard for the truth'. United States ex rel. Kriendler v. United Technologies Corp, 985 F.2d 1148, 1157 (2nd Cir. 1993) (citations omitted).

> The government's prior knowledge of an allegedly false claim can vitiate a FCA action. United States ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 545 (7th Cir. 1999) (citations omitted).

> [T]he knowledge possessed by officials of the United States may be highly relevant. Such knowledge may show that the defendant did not submit its claims in deliberate ignorance or reckless disregard of the truth. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) *appeal after remand* 81 F.3d 1465 (9th Cir. 1996).
>
> We agree with the Kriendler and Hagood courts that a defendant's knowledge that the government is aware of the falsity of the claim can, under certain circumstances, be relevant to *means rea*. United States v. Southland Mgmt. Corp., 288 F.3d 665, 686 (5th Cir. 2002), *rehearing, en banc, granted by* 307 F.3d 352.

Further, contrary to Petitioner's suggestion, nothing in the Fourth Circuit opinion suggests that the government's knowledge of an allegedly false claim automatically bars a qui tam action. On the contrary, the Fourth Circuit simply holds that the government's knowledge can negate the scienter requirement for an FCA violation in the appropriate case. (App. 14.) Based on the undisputed facts showing that the government not only knew of but also directed and ordered the alleged representation in the present case, the Fourth Circuit concluded that summary judgment was properly entered. (App. 15.) Reported decisions show that other circuits agree that this issue, in the proper case, is appropriate for decision as a matter of law. See Shaw, 213 F.3d at 534 (in appropriate case, government knowledge and cooperation can negate scienter as a matter of law); Durcholz, 189 F.3d at 545 (affirming summary judgment

in favor of defendant based on government knowledge); Hagood, 929 F.2d at 1421 (court may conclude at summary judgment stage that defendant is not liable based on government knowledge).

Therefore, no basis exists to claim that the United States Courts of Appeals disagree about the relevance or potential impact of the government's knowledge on the issue of scienter in an FCA case.

C. This Court Should Deny the Petition Because the Petitioner Has Never Presented Evidence of a Viable Claim under the Federal False Claims Act.

1. Lack of Falsity

It is well established that one of the most basic elements of any claim pursuant to the Federal False Claims Act is some false statement of fact or some false record. 31 U.S.C. § 3729(a). However, despite years of discovery, Becker has never identified any false statement or record made by WSRC in connection with the appropriations transfer. This is not surprising in light of the fact that the appropriations transfer theory asserted in response to WSRC's motion for summary judgment was based on alleged improper actions of DOE not on alleged improper actions of WSRC.[4]

Becker's only attempt to identify a false statement made by WSRC comes in the assertion that WSRC assigned new B&R accounting codes to the transferred funds. The initial problem with Becker's assertion is that the change in B&R codes was not and is not false. It

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[4] Becker has never cited any case law to support a finding of liability against WSRC based on the actions of DOE.

is undisputed that DOE transferred the funds from DP accounts to EM accounts. Once DOE completed this transfer, DOE directed WSRC to change the B&R codes to accurately reflect that the money had been transferred. Since the funds had been transferred, the new B&R codes assigned by WSRC were accurate and truthful.

Even assuming that the B&R codes contain some implicit representation by WSRC that the funds had been properly transferred, Becker failed to present any evidence that this representation was false because he never presented any evidence that the transfer was improper. At best, Becker has shown that Congressional authorization was required and that Congressional authorization *may not* have been obtained. (App. 56.) However, Becker, at trial and on appeal, has never shown any evidence that Congressional authorization was denied or was not obtained. Instead, Becker has relied on his expert's "idle speculation that all necessary approvals *might not* have been obtained." (App. 59.) This idle speculation is entitled to no weight because it resulted from "the expert's failure to review any documents manifesting the approval, and his failure to request copies of any such documents from DOE or Congress." (Id.) Further, the speculation of Becker's expert ignores all direct and circumstantial evidence that Congressional authorization was obtained.

First, Becker's expert failed to consider or explain why 42 U.S.C. § 7269(b), which specifically governs DOE appropriations transfers, did not authorize this funds transfer. Section 7269(b) provides as follows:

> The unexpended balances of prior appropriations provided for activities in this Act, or subsequent Energy and Water Development Appropriations Acts may hereafter be transferred to appropriation accounts for such activities established pursuant to this title. Balances so transferred may be merged with funds in the applicable established accounts and thereafter may be accounted for as one fund for the same time period as originally enacted.

Second, Becker's expert failed to adequately challenge the affidavit of DOE's Chief Financial Officer at the Savannah River Site which states that DOE had informed Congress about the appropriations transfer and that the transfer of funds occurred as a result of negotiations between Congress and DOE. (App. 59.) Third, Becker and his expert have never explained why Congress' recognition in the Conference Report for FY 1996 that there were more than $667 million in uncosted balances in the EM accounts does not reflect, at least, Congressional knowledge and approval of DOE's movement of large uncosted balances from the DP to the EM accounts. (Id.)

In light of the evidence supporting Congressional authorization of the funds transfer and the total absence of evidence indicating an actual denial or lack of Congressional authorization, Becker has not and cannot show a question of fact with respect to the authorization of the funds transfer. Therefore, he cannot show that any "implicit representation" or record regarding the transfer made by WSRC was false.

2. Lack of Knowledge or Deliberate Ignorance.

The False Claims Act imposes liability for "knowing" and material violations of the Act. A "knowing" violation occurs when a defendant has actual knowledge a statement was false, acted in deliberate ignorance of the truth or falsity of the statement, or acted with reckless disregard for the truth or falsity of the statement. 31 U.S.C. § 3729(b); United States ex. rel. Oliver v. The Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999); Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) *appeal after remand* 81 F.3d 1465 (9th Cir. 1996). Innocent mistakes, negligent misrepresentations, oversights, or differences in opinion are not "knowing" false statements under the Act. Oliver, 195 F.3d at 464; Hagood, 929 F.2d at 1416. Further, a false statement which is based on a good faith, but incorrect, interpretation of a regulation cannot be considered a "knowing" false statement. Oliver, 195 F.3d at 464; Hagood, 929 F.2d at 1416. Simply put, the requisite intent is the knowing presentation of what is known to be false. Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir.) *cert. denied* 519 U.S. 865 (1996).

The only evidence presented by Becker to suggest that WSRC was aware of any question concerning Congressional authorization for DOE's transfer of funds are two DOE memoranda which allegedly contain questions about the funds transfer. (App. 60–63.) As an initial matter, these memoranda do nothing to prove WSRC had any knowledge concerning the impropriety of the transfer because this is a DOE, not a WSRC memorandum. These documents were authored and received by DOE employees, they do not mention WSRC,

and there is no indication WSRC received copies of the memoranda prior to the instigation of Becker's lawsuit. (Id.)

Further, even if WSRC received the memoranda, they do nothing to show WSRC's knowledge because the memoranda do not even suggest that there was anything improper or inappropriate about the funds transfer and they do not state or imply that Congress did not approve the transfer. Instead, the memoranda merely raise questions concerning the appropriate accounting and handling of the funds after the transfer. (App. 62.) The memoranda, at most, could create an awareness of some question about the funds, but this general awareness "falls far short of the 'known to be false' standard" required for liability under the False Claims Act. (Id.)

CONCLUSION

Based upon the foregoing, Respondent WSRC respectfully requests this Court to deny the Petition for Writ of Certiorari.

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UNITED STATES OF AMERICA ex rel. MARTIN BECKER,

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WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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6 pp

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Per United States Supreme Court Rule, 15.6, this is a reply to the new points made in the Brief in Opposition submitted in the instant case, on March 31, 2003.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT OPINION DOES CONFLICT WITH DECISIONS OF THIS COURT AND THE FCA.

Respondent Westinghouse argues that the Fourth Circuit opinion does not conflict with the 1986 amendments to FCA or the Court's decision in *Hughes Aircraft v. United States ex. rel. Schumer*, 520 U.S. 939 (1997). (Response, pp.3-4). A plain reading of the lower court opinion demonstrates that the Fourth Circuit applied the FCA as it existed prior to the 1986 amendments, and thus conflicts with *Hughes* and 1986 amendments to the FCA. Accordingly, the lower court opinion affirmed a grant of summary judgment based on government agency knowledge of unauthorized expenditure. After quoting from *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999), that "the government's knowledge effectively negates the fraud or falsity required by the FCA," the Fourth Circuit opinion held:

> DOE's full knowledge of the material facts underlying any representations implicit in Westinghouse's conduct negates any knowledge that Westinghouse had regarding the truth or falsity of those representations. (App. 15, 30).

It is thus clear that the Fourth Circuit opinion upheld prior disclosure to the government as a full defense in this case.

However, as noted by this Court in *Hughes,* the 1986 amendments to the FCA "eliminates a defense to a *qui tam* suit - - prior disclosure to the Government." 520 U.S. at 948. The Fourth Circuit opinion conflicts with *Hughes* by holding that the Government's (DOE's) knowledge negates any knowledge that Westinghouse had. Moreover, this holding is a direct application of the pre-1986 law that Government knowledge is a valid defense. On this basis the Court of Appeals affirmed the grant of summary judgment in favor of Westinghouse.

As further evidence that the Fourth Circuit applied the pre-1986 law, the Court of Appeals opinion recognized that the FCA imposes civil liability on any person who knowingly makes, uses, or causes to be made or used, a false record or statement and that a person acts "knowingly" if he or she knows the record or statement is false or acts in deliberate ignorance of, or with reckless disregard for, the truth or falsity of the record or statement. (App. 11, 26). Notwithstanding Respondent's argument to the contrary (Response, p. 2,

Fn. 1), the Court of Appeals opinion also recognized that the evidence did not show that Congressional approval for the use of the funds at issue was given (App. 8, Fn. 3), that "Westinghouse was aware of the uncertainty ... regarding Congressional authority for the appropriation transfer" of the $12 Million, (App. 9, 24), and, it "is possible to infer from the evidence that ... Westinghouse at least negligently disregarded whether Congress had approved the appropriation transfer," (App. 12, 27), when using these public funds "for plant expenditures unrelated" (App. 9, 24) to the purpose for which the funds had been appropriated by Congress.

The Court of Appeals opinion thus recognizes that the elements necessary to impose civil liability on Westinghouse are present in this case. The opinion recognizes that Westinghouse was aware (knew) Congressional approval was not given (App. 9, 24) and Westinghouse recklessly disregarded whether Congressional approval was given (App. 12, 27), but nonetheless used $12 Million of public funds for purposes unrelated to the purpose for which the funds were appropriated. On these findings, summary judgment could not be granted if the 1986 FCA amendments were applied.

Nevertheless, the Fourth Circuit concluded that because "DOE had at least as much knowledge as Westinghouse regarding Congressional authority for the transfer," (App. 12, 27) government knowledge negated any knowledge that Westinghouse had, and on this basis affirmed the grant of summary judgment. But the Fourth Circuit, in so holding, explicitly applies

pre-1986 law which makes Government knowledge a defense. Allowing Government knowledge as a defense squarely conflicts with the pronouncement of this Court in *Hughes* that the 1986 amendments to the FCA "eliminates" prior disclosure to the Government as a defense to a *qui tam* suit. Thus, the Fourth Circuit opinion not only conflicts with the pronouncement of this Court in *Hughes*, but also disregards the Congressional enactment of the 1986 FCA amendments eliminating prior disclosure to the Government as a defense. The Fourth Circuit opinion applies the same law that Congress repealed when it amended the FCA in 1986.

Petitioner's reasoning is reinforced by this Court's March 10, 2003 opinion in *Cook County v. United States ex. rel. Chandler*, 538 U.S., (No. 01-1572, decided March 10, 2003) in which this Court cited *Hughes* with approval and noted:

> The basic purpose of the 1986 amendments was to make the FCA a "more useful tool against fraud in modern times." S. Rep., at 2. Because Congress was concerned about pervasive fraud in "all Government programs" *ibid.*, it allowed private parties to sue even based on information already in the Government's possession. *Cook County*, Slip Op. at 12.

CONCLUSION

This Court's repeated recognition that Government agency knowledge is not a defense, and certainly not an *absolute* defense, to a FCA claim warrants a grant of certiorari, or summary reversal in light of both *Hughes* and *Cook County*, because the Court of Appeals opinion applied pre-1986 amendment law making Government knowledge an *absolute* defense in this case.

Respectfully submitted,

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